14-556

Supreme Court of the United States

Supreme Court, U.S.
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BRITTANI HENRY, *et al.*,
Petitioners,

—v.—

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,
Respondent.

JAMES OBERGEFELL, *et al.*,
Petitioners,

—v.—

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Ohio's constitutional and statutory bans on recognition of marriages of same-sex couples validly entered in other jurisdictions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

2. Whether Ohio's refusal to recognize a judgment of adoption of an Ohio-born child issued to a same-sex couple by the courts of a sister state violates the Full Faith and Credit Clause of the U.S. Constitution.

PARTIES TO THE PROCEEDING

This petition seeks Supreme Court review of two cases challenging the State of Ohio's constitutional and statutory bans on recognition of valid, out-of-state marriages between persons of the same sex, as well as to the State's refusal to recognize an out-of-state judgment of adoption issued to a same-sex couple.

Petitioners from *Obergefell v. Himes* are James Obergefell, David Brian Michener, and Robert Grunn.

Petitioners from *Henry v. Himes* are Brittani Henry and Brittni Rogers, Georgia Nicole Yorksmith and Pamela Yorksmith, Kelly Noe and Kelly McCracken, and Joseph J. Vitale and Robert Talmas and their son—Adopted Child Doe.

Petitioners were all plaintiffs in the District Court and appellees in the Court of Appeals.

Respondent is Richard Hodges, who in the course of the litigation replaced formerly named defendant Lance D. Himes as Director of the Ohio Department of Health ("Director"). He is sued in his official capacity only. An official serving as Director has been a defendant in the District Court and appellant in the Court of Appeals in both *Obergefell* and *Henry*.

The following persons or entities also were parties to proceedings below, but are no longer parties:

John Arthur, spouse of Petitioner James Obergefell, was a plaintiff in the District Court in *Obergefell*, but passed away prior to the final judgment.

Adoption S.T.A.R., Inc. was a plaintiff in the District Court in *Henry* and dismissed from the action, and was an appellee before the Sixth Circuit, but does not join this petition.

Ohio Governor John Kasich and Ohio Attorney General Mike DeWine were defendants in the District Court in *Obergefell*, but were voluntarily dismissed from the case prior to the final judgment.

Theodore E. Wymyslo, M.D., in his former capacity as Director of the Ohio Department of Health, was a defendant in the District Court in *Obergefell*, but was substituted by Lance Himes, his successor as Director, in the appellate court. Himes in turn was succeeded as Director by Richard Hodges, who has been substituted as current Respondent.

Camille Jones, M.D., in her official capacity as Registrar of the City of Cincinnati Health Department Office of Vital Records, was a defendant in the District Court, but did not appeal from the final judgment.

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JOINT PETITION FOR WRIT OF CERTIORARI

James Obergefell, David Brian Michener, Robert Grunn, Brittani Henry, Brittni Rogers, Georgia Nicole Yorksmith, Pamela Yorksmith, Kelly Noe, Kelly McCracken, Joseph J. Vitale, Robert Talmas, and Adopted Child Doe respectfully petition the Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the cases *Obergefell v. Himes*, No. 14-3057, and *Henry v. Himes*, No. 14-3464. This joint petition is permitted by Supreme Court Rule 12.4 and warranted because of the identity of legal issues and interests in these cases.

This Court's intervention is urgently needed to correct the division among the circuits created by the decision below on questions of exceptional importance, particularly to thousands of same-sex couples and their children nationwide.

OPINIONS BELOW

Both cases presented by this joint petition challenge those portions of Ohio's constitutional and statutory provisions that deny legal recognition within the state to marriages entered in other jurisdictions between same-sex spouses. Ohio Const. art. XV, § 11; Ohio Rev. Code § 3101.01(C) (the "marriage bans" or "bans"). *Henry* also challenges Ohio's refusal to accord full faith and credit to the out-of-state adoption decree obtained by a same-sex couple.

The two cases were decided by the same judge of the United States District Court for the Southern District of Ohio and consolidated by the Sixth Circuit for purpose of submission on appeal. In a single

opinion, the Sixth Circuit reversed the district court decisions, along with district court rulings in similar challenges to marriage restrictions on same-sex couples in the other Sixth Circuit states, Kentucky, Michigan, and Tennessee.

The Sixth Circuit's opinion is not yet published but available at 2014 WL 5748990 (6th Cir. Nov. 6, 2014), and reprinted in the Appendix at 1a-106a. The District Court's Order Granting Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction in *Henry v. Himes*, is not yet published but available at 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014), and reprinted in the Appendix at 107a-60a. The District Court's Final Order Granting Plaintiffs' Motion For Declaratory Judgment and Permanent Injunction in *Obergefell v. Wymyslo*, is published at 962 F. Supp. 2d 968 (S.D. Ohio 2013), and reprinted in the Appendix at 161a-221a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Const. art. XV, § 11

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Rev. Code § 3101.01(C)

(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code.

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

STATEMENT OF THE CASE

These cases are about love, from birth to death. The relationships at the heart of each case involve the love spouses share, with each other and with the children they jointly raise, and the love that survives the death of a spouse. This enduring love has prompted this Court to hold that "[c]hoices about marriage" belong to the individual and are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Yet, despite this Court's unequivocal insistence that the Fourteenth Amendment encompasses a fundamental right to marry "for all individuals," *Zablocki v.*

Redhail, 434 U.S. 374, 384 (1978), Ohio singles out the lawful marriages of lesbians and gay men and treats them as invalid, turning members of these committed families into legal strangers.

By disrespecting their marriages, Ohio has done more than deny Petitioners basic legal rights to which they are entitled. It has treated Petitioners as second-class citizens whose most intimate relationships have been denied the dignity and respect they deserve.

A. Ohio's Marriage Recognition Bans

In 2004, a majority of Ohio voters and the state legislature voted to deny lesbian and gay couples whose marriages had been performed in other jurisdictions all constitutional and legal rights of marriage. First, the Ohio legislature amended Ohio law to prohibit same-sex couples from marrying in the State and bar officials from recognizing marriages entered by persons of the same sex in other jurisdictions. Ohio Rev. Code § 3101.01(C)(2). Through the law, supporters in the legislature sought to ensure that the relationships of same-sex couples would not become "equal to everyone else's." Pet. App. 167a.

That same year, Ohio voters passed a ballot initiative adding to the Ohio Constitution an amendment prohibiting not only the creation or recognition of marriages between persons of the same sex in Ohio, but also recognition of any "legal status ... that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. art. XV, § 11. The campaign in support of the amendment contained numerous negative and inaccurate

representations of lesbians and gay men, including warnings to employers that same-sex relationships "expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span," and to voters that "[w]e won't have a future unless [heterosexual] moms and dads have children." App. 168a.

B. Petitioners

Petitioners include four loving and committed same-sex couples raising children together, the adopted child of one of the couples, and two widowers who prematurely lost the loves of their lives. Ohio does not contest the validity of their out-of-state marriages; it simply refuses to recognize them. Accordingly, Petitioners have been denied the full dignity and financial and emotional benefits Ohio provides to different-sex spouses, including, most urgently, the recognition of their marriages on critical family identification documents such as birth and death certificates.

1. The *Obergefell* Petitioners

James Obergefell is a resident of Ohio. When John Arthur, his partner of two decades, was diagnosed in 2011 with terminal amyotrophic laterial sclerosis ("ALS"), James stood by his side and cared for him through his illness. App. 169a. Determined to be married before John died, the couple boarded a medically equipped plane, traveled to Maryland with the support of friends, and were wed on the tarmac on July 11, 2013. John died a few months later. *Id.*

David Michener is also an Ohio resident. He wed William Ives, his partner of 18 years, on July 22,

2013, in Delaware. One month later, William tragically died of natural causes. *Id.*

Following the death of their spouses, James Obergefell and David Michener each sought death certificates that acknowledged their marriages to John and William. Were James and David women, Ohio would have routinely listed their deceased spouses as married on the death certificates, and James and David would have been listed as surviving spouses. Because each is a man who had married another man, they were treated by Ohio as legally unconnected—strangers under the law—to the person they most loved and had chosen to marry.

The third *Obergefell* Petitioner, Robert Grunn, is an Ohio funeral director whose responsibilities involve filling out death certificates, including for Ohio decedents with spouses of the same sex. These death certificates are required for burial, cremation, insurance, and other purposes following death.

2. The *Henry* Petitioners

Petitioners from *Henry* include four same-sex couples who entered into valid marriages outside Ohio. Three of the four couples are women who conceived using anonymous donor insemination ("AID") and gave birth to children in Ohio during this litigation. The fourth are married men living in New York who adopted an Ohio-born child, also a Petitioner. App. 110a. Among other marital protections, these couples urgently seek accurate birth certificates listing both spouses as the parents of their respective children. The Ohio Department of Health routinely issues birth certificates naming as parents different-sex spouses

who jointly adopt or use AID to conceive children. Yet because of the bans, Ohio has refused to recognize Petitioners Brittni Rogers, Pam Yorksmith, and Kelly McCracken (the spouses who are genetically unrelated to their children) as parents. App. 113a-15a.

Similarly, *Henry* Petitioners Joseph Vitale and Robert Talmas secured a duly-issued order of adoption from a New York court decreeing both men the legal parents of Ohio-born Adopted Child Doe. But Ohio refuses to treat them as it would a different-sex married couple or to accord the full faith and credit due their New York adoption decree, claiming that doing so would violate Ohio public policy. Instead, Ohio will allow just one of them to appear on their child's amended birth certificate. App. 115-17a.

In addition to their urgent need for accurate birth certificates, Petitioners seek the full panoply of protections for their families that come with recognition of a couple's marriage, ranging from acknowledgment of parental rights arising under the marital presumption; to tax, inheritance, and a range of other financial rights; to health care decision-making and visitation rights; to federal rights dependent on the state's recognition of their marital status. App. 130a-34a. Petitioners also seek the dignity that comes from legal respect for their marriage and commitment to one another and to their children.

C. District Court Proceedings

1. *Obergefell v. Wymyslo*

On July 19, 2013, Petitioner Obergefell and his husband filed a complaint against the Director of the Ohio Department of Health, the Cincinnati Vital Records Registrar, and the Governor and Attorney General of Ohio (both of whom subsequently were voluntarily dismissed), alleging that the marriage bans, as applied to them, violate constitutional guarantees of due process and equal protection.

The same day, the couple moved for a temporary restraining order ("TRO") requiring Ohio to recognize their marriage on John's death certificate should the need arise. That TRO was granted on July 22, 2013, and upon John's death in October, Ohio issued a death certificate accurately naming James as his surviving spouse. App. 169a. On September 3, 2013, Petitioner David Michener joined the case and moved for a TRO requiring Ohio to recognize his marriage to and status as surviving spouse on William's death certificate. The court granted the TRO the same day. 169a-70a.

On October 29, 2013, the *Obergefell* Petitioners moved for a declaratory judgment on their as-applied claims, and to permanently enjoin the Director and his officers from applying the marriage recognition bans against them in issuing death certificates.[1] The

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[1] While the State has, pursuant to the District Court's order, issued accurate death certificates, it has also repeatedly asserted that it can amend the death certificates issued to the married decedents in the future to remove references to their marriages and identification of the *Obergefell* Petitioners as

record included live testimony from the TRO hearing, uncontested expert declarations, and declarations from each plaintiff explaining the impact of the Ohio marriage bans on their lives. After full briefing and argument, the District Court granted the motion on December 23, 2013, ruling "that under the Constitution of the United States, Ohio must recognize valid out-of-state marriages between same-sex couples on Ohio death certificates." App. 162a.

The District Court held that "the right to remain married . . . is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution. . . . Ohio's marriage recognition bans violate this fundamental right without rational justification." App. 174a.

The District Court also held that Ohio's marriage recognition bans discriminate on the basis of sexual orientation and fail under both heightened equal protection scrutiny, App. 203a, and rational basis review under the Equal Protection Clause, App. 204a.

The court rejected the State's "vague, speculative, and unsubstantiated" justifications, which it found "do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries" suffered by the Petitioners. App. 180a. The court ruled that Ohio's proffered interests in preserving "tradition" and proceeding with "caution" were not legitimate. App. 208a-09a.

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their surviving spouses. Br. of Appellant, *Obergefell v. Himes*, No. 14-3057, 2014 WL 1512606, at *54 (6th Cir. April 10, 2014).

The court also rejected justifications raised by *amicus* about the welfare of children, concluding:

> Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, which it is not, there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal. . . . The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married.

App. 209a-11a. The Director filed a timely notice of appeal of the final judgment; the Cincinnati Registrar did not appeal.

2. *Henry v. Himes*

On February 10, 2014, the *Henry* Petitioners filed suit against Respondent and the Cincinnati Vital Records Registrar, asserting that Ohio's refusal to respect their marriages violates federal constitutional guarantees of due process, equal protection, and the right to travel. *Henry* went "beyond the as-applied challenge pursued in *Obergefell*," alleging more broadly that no set of circumstances exist under which the marriage recognition bans can be validly applied. App. 118a. The suit also asserted that Ohio's refusal to recognize the Vitale-Talmas adoption decree violates full faith and credit. The record includes uncontested expert declarations, and declarations from each plaintiff

explaining the impact of the Ohio marriage bans on their lives. After full briefing and argument, the District Court issued a declaratory judgment and permanent injunction in Petitioners' favor on April 14, 2014. App. 150a.

Drawing from its analysis in *Obergefell*, the District Court held that "Ohio's refusal to recognize same-sex marriages performed in other jurisdictions violates the substantive due process rights of the parties to those marriages" by depriving them "of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so." App. 137a. Respondent, the court concluded, had "again failed to provide evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer when they lose this immensely important dignity, status, recognition, and protection, as such a state interest does not exist." *Id.* The court found "specious" Respondent's "repeated appeal to the purportedly sacred nature of the will of Ohio's voters," given the federal Constitution's supremacy. App. 135a.

The District Court in *Henry* also reaffirmed *Obergefell*'s holding that Ohio's marriage recognition bans discriminate on the basis of sexual orientation and therefore warrant heightened equal protection scrutiny, App. 142a-43a, though they also fail rational basis review, App. 144a. Having already "considered and rejected as illegitimate and irrational any purported State interests justifying the marriage recognition bans" in *Obergefell*, the court determined that "[a]ll advanced interests are as inadequate now as they were several months ago." App. 145a.

Because the record—including the judicially noticed record of *Obergefell*—was "staggeringly devoid of any legitimate justification for the State's ongoing arbitrary discrimination on the basis of sexual orientation," the court declared the marriage bans "facially unconstitutional and unenforceable under any circumstances." App. 108a. In so holding, the court cited the judiciary's "responsibility to give meaning and effect to the guarantees of the federal constitution for all American citizens," which is "never more pressing than when the fundamental rights of some minority citizens are impacted by the legislative power of the majority." *Id.* Recognizing the severe irreparable harm suffered by Petitioners—and particularly their children—the court permanently enjoined Respondent and his officers and agents from enforcing the bans. App. 150a-51a.

The District Court also granted the Vitale-Talmas family's distinct full faith and credit claim to enforce the New York adoption decree. The court held that violations of full faith and credit by the State are subject to federal challenge under 42 U.S.C. § 1983. It concluded that the full faith and credit guarantee requires Ohio to grant full recognition to the Vitale-Talmas family's adoption decree, including for purposes of issuing a birth certificate correctly identifying both men as parents. App. 148a, 153a n.i. The court enjoined Respondent from denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions. App. 151a.

The court subsequently stayed its mandate except as to the Petitioners' children's birth certificates. App. 152a.[2]

3. The Sixth Circuit Decision

Respondent's appeals in *Obergefell* and *Henry* were consolidated by the Sixth Circuit. Both cases were argued on August 6, 2014, along with four related appeals from district court decisions striking down marriage or recognition bans in Kentucky, Tennessee, and Michigan.

On November 6, 2014, a divided panel of the Sixth Circuit reversed the lower courts in all six cases. The majority began by framing the ultimate issue before the court as "[w]ho decides"—the federal courts or the state democratic processes? App. 16a. Opining that it is "[b]etter" to leave social change to "the customary political processes," the majority concluded that the courts should not "resolve new social issues like this one." App. 69a.

The court decided as a threshold matter that it was bound to reject Petitioners' claims based on this Court's one-line, summary dismissal more than forty years ago of a challenge to Minnesota's refusal to issue a marriage license to a same-sex couple in *Baker v. Nelson*, 409 U.S. 810, 810 (1972). App. 24a.

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[2] Each child of the *Henry* Petitioner couples was issued a birth certificate listing both of his or her parents pursuant to the order of the District Court. App. 151a. Respondent included on these birth certificates special notations that they were issued pursuant to the District Court's order, and the certificates are susceptible to amendment under Ohio Rev. Code § 3705.22.

Rather than end its opinion there, however, the majority went on to address the merits of the constitutional arguments raised by the plaintiffs in the six cases and concluded that none makes the case for "removing the issue from . . . the hands of state voters." App. 29a.

The court held that the marriage bans did not infringe upon the fundamental right to marry, reasoning that a "right to gay marriage" neither appears in the Constitution nor is premised on "bedrock assumptions about liberty." App. 47a-48a. It dismissed the significance of this Court's decisions in *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki*, 434 U.S. at 383, and *Turner v. Safley*, 482 U.S. 78, 94-95 (1987), on the ground that the right to marry identified in those cases is "tethered to biology" and procreation. App. 49a.

Citing circuit precedent holding that rational basis review applies to sexual orientation classifications, the court rejected the argument that the marriage bans trigger heightened equal protection scrutiny. The court also reasoned that heightened scrutiny is unwarranted because, although gay people have experienced prejudice in this country, "the institution of marriage arose independently of this record of discrimination"; thus, "[t]he order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage. . . ." App. 53a. Noting political successes by lesbians and gay men in other contexts, the majority determined that the case did not present a "setting in which 'political powerlessness' requires 'extraordinary protection from the political process.'" App. 56a-57a.

Applying rational basis review, the court determined that two purported rationales suffice to meet this standard: i) the marriage bans rationally further the government's interest in regulating male-female relationships because of their procreative capacity and "risk of unintended offspring," App 5a-36a, and ii) the government's desire to "wait and see" and rely on the democratic process to change a long-accepted norm. App. 36a-37a. The court further held that the marriage bans were not driven by animosity towards lesbians and gay men or designed to make this group unequal to everyone else. App. 42a.

The majority acknowledged that the marriage bans deprive same-sex couples and their families of "benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns)" and that "[t]hese harms affect not only gay couples but also their children." App. 40a. The majority noted that it was questionable whether the purported benefits of the marriage bans justified those harms but nevertheless concluded that the issue must be left to the democratic process. According to the majority, "[t]he question demands an answer—but from elected legislators, not life-tenured judges." *Id.*

The majority also held that the states' refusal to recognize the marriages of same-sex couples entered in other states does not violate the right to due process or equal protection largely for the same reasons it rejected these challenges to the prohibition against marrying within the states. And, it held that non-recognition does not violate the right to travel because non-residents are treated the same as citizens of the domicile state. App. 63a-68a.

Although the majority did not specifically address the Vitale-Talmas Petitioners' full faith and credit claim, its blanket reversal of all six lower court decisions reversed the Ohio district court's ruling on this claim as well.

Judge Daughtrey dissented, noting that "under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite." App. 101a.

The dissent deemed a thorough explication of the legal basis for striking down the marriage bans unnecessary, citing with approval the recent opinions of the Fourth, Seventh, Ninth, and Tenth Circuits on the same questions. App. 86a-87a. *See Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014), *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014).

However, the dissenting opinion specifically addressed and rejected the rationales for the marriage bans accepted by the majority. In rejecting the "irresponsible procreation" rationale, Judge Daughtrey noted that while the majority views marriage as "an institution conceived for the purpose of providing a stable family unit 'within which children may flourish,' they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit." App. 72a.

With respect to the "wait and see" rationale, the dissent again emphasized the court's responsibility to decide cases involving individual rights, noting that this same argument was raised and rejected in *Loving* and *Frontiero v. Richardson*, 411 U.S. 677 (1973). App. 103a. Judge Daughtrey concluded her dissent by stating that "[i]f we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams." App. 106a.

REASONS FOR GRANTING THE JOINT PETITION

The Sixth Circuit majority's ruling robs married same-sex spouses and their children of dignity and legal respect from cradle to grave. It squarely and irreconcilably conflicts with four other circuits on a question of pressing national importance—the right of committed same-sex spouses to lead their lives as married, protect each other and their children through marriage, and move securely among the states. The ruling can be expected to breed chaos in the courts, among employers, and, most fundamentally, in the lives of thousands of lesbian and gay families, who will have no assurance when they cross state lines that they will carry their marital statuses with them. More than 62 percent of the country lives in a state where same-sex couples can now marry. *See States, Winning the Freedom to Marry: Progress in the States*, Freedom to Marry, http://www.freedomtomarry.org/states/ (last updated Nov. 6, 2014). Ohio's refusal to respect marriages

entered in those jurisdictions creates an intolerable situation for lesbian and gay spouses living, working, visiting, or otherwise having interactions in Ohio.

The Sixth Circuit decision likewise exacerbates a split in the circuits on a separate question also deeply important to same-sex families and their children—whether a state must accord full faith and credit to sister state judgments of adoption of children parented by same-sex couples.

The Ohio cases present excellent vehicles to resolve these issues now dividing the circuits and affecting families throughout the nation.

I. The Sixth Circuit Ruling Creates a Split Among the Circuits on the Rights of Same-Sex Couples to Recognition of Their Marriages, Deciding Incorrectly a Constitutional Question of Pressing Nationwide Importance.

1. The Sixth Circuit decision is in direct conflict with recent rulings of the Fourth, Seventh, Ninth, and Tenth Circuits, which each—correctly—declared unconstitutional state bans on the right to marry and on recognition of out-of-state marriages of same-sex couples. *Bostic*, 760 F.3d 352; *Baskin*, 766 F.3d 648; *Latta*, 2014 WL 4977682; *Kitchen*, 755 F.3d 1193; *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014). Only this Court can resolve this split among the circuits on a question of undeniable national significance. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (*certiorari* granted "to resolve the disagreement among the Courts of Appeals on a question of national importance").

2. The Sixth Circuit's departure from its sister circuits—as well as from the overwhelming consensus among lower federal and state courts addressing constitutionally-guaranteed marriage rights for same-sex couples post-*United States v. Windsor*, 133 S. Ct. 2675 (2013)—carries profound life-long consequences for thousands of families in Ohio and throughout the nation. *See Marriage Rulings in the Courts*, Freedom to Marry, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last updated Nov. 12, 2014) (gathering cases). Same-sex couples living in Ohio cannot get married at home. Those who travel to other states to wed are stripped of their status as married spouses and the extensive legal rights that come with it when they return home. As this Court has observed, those rights span "the mundane to the profound." *Windsor*, 133 S. Ct. at 2694.

The Sixth Circuit decision also leaves children with same-sex parents unable to obtain even a birth certificate that accurately describes their families, much less have the security of a government-recognized parent-child relationship. Birth certificates are the basic currency allowing parents to fulfill their constitutionally-protected right to care for their children, providing prime evidence of parentage and allowing adults to make critical health care decisions for their children, enroll their children in school, insure their children, and freely travel with their children. *Windsor* decried precisely the injuries the Sixth Circuit's decision allows Ohio to impose on children in Ohio and beyond: the "humiliat[ion]," *id.*; "financial harm," *id.* at 2695; and "stigma," *id.* at 2693, inflicted on these children by governmental disrespect for their

parents' marriages. "[It] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694.

The Sixth Circuit's decision inflicts a final blow even after death, denying deceased spouses and grieving widowers the dignity and legal rights that flow from a death certificate acknowledging their marriage and legal commitment.

3. At multiple junctures throughout its opinion, the Sixth Circuit majority made critical errors of law, heightening the need for intervention by this Court. While the majority opinion is riddled with flaws, the following summarizes several major missteps and departures from the correct reasoning that guided the other circuits.

First, the majority held that this Court's 1972 summary dismissal of the appeal in *Baker* for lack of a substantial federal question forecloses review by all lower courts of challenges to state bans on marriage rights for same-sex couples. App. 24a-25a. Yet all four other circuits considering the issue correctly concluded that *Baker* has been superseded by intervening doctrinal developments clearly rendering the federal question "not only substantial but pressing." *Latta*, 2014 WL 4977682, at *3; *see also Baskin*, 766 F.3d at 659-60; *Bostic*, 760 F.3d at 373-75; *Bishop*, 760 F.3d at 1079-80; *Kitchen*, 755 F.3d at 1204-08. The Sixth Circuit majority's continued reliance on *Baker* ignores decades of doctrinal developments in this Court, plunging the nation back into *Baker*'s "dark ages . . . [of] litigation over discriminations against" lesbian and gay people.

Baskin, 766 F.3d at 660. Its reasoning, though wrong, leaves this the sole court in the nation able to consider the merits of a federal constitutional challenge to discriminatory marriage laws like Ohio's. Under the Sixth Circuit's holding, this is the Court of *only* resort for same-sex families subjected to discriminatory state marriage restrictions.

Second, in ruling, incorrectly, that the well-settled fundamental right to marry and to recognition of one's marriage does not encompass same-sex couples, App. 47a-51a, the court below split from well-reasoned decisions of the Fourth and Tenth Circuits, *Bostic*, 760 F.3d at 377 (the fundamental right to marry includes the right to marry a spouse of the same sex); *Kitchen*, 755 F.3d at 1218; *Bishop*, 760 F.3d at 1079-80.

As this Court's jurisprudence teaches, same-sex couples cannot be excluded from the fundamental right to marry by dismissing their claimed right as a "new" right to "same-sex marriage." The Sixth Circuit's mischaracterization of the fundamental right at issue repeats the mistake of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which erroneously framed the issue in that case as whether the Constitution protects a "fundamental right [for] homosexuals to engage in sodomy"—and thereby "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence v. Texas*, 539 U.S. 558, 566-67 (2003). Reversing *Bowers*, this Court explained in *Lawrence*: "Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and "[p]ersons in a homosexual relationship may

seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574. *Lawrence* thus demonstrates "that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d at 377. Same-sex couples have been denied this autonomy by the Ohio bans, which withhold only from them the constitutional protections for their marriages secured to "*all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added).

The Sixth Circuit also disregarded a central holding in *Loving*, which made emphatically clear that couples have fundamental rights to have their marriages accorded legal recognition and protection not just in the jurisdictions where the marriages were celebrated, but also across state lines. The fundamental right to marry would be meaningless if states could deny a whole class of married spouses the dignity and legal protections that come with respect for their marriages once entered. In *Loving*, this Court struck down not only Virginia's prohibition on interracial marriages within the state, but also its statutes denying recognition to and criminally punishing such marriages entered outside the state. 388 U.S. at 4. Significantly, this Court held that Virginia's statutory scheme, including its penalties imposed on out-of-state marriages and voiding of marriages obtained elsewhere, "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12.

After all, only when the wedding is over, the guests are gone, and the couple returns home as

spouses does marriage as "a way of life" commence. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). But as soon as married same-sex couples step foot in Ohio, the bans strip them of their rights and dignity as married spouses. Moreover, the bans' categorical refusal to give effect to marriages entered in other jurisdictions between spouses of the same sex is an unprecedented departure from Ohio's historical recognition of out-of-state marriages of all other couples, even of those barred from marrying under Ohio law. App. 190a-92a. Had Petitioners married different-sex spouses, Ohio would have welcomed the newlyweds with open arms, granting full legal recognition to their marriages and to their parental rights and responsibilities. The Ohio marriage bans thus strike at the heart of the liberty afforded Petitioners under the Fourteenth Amendment.

Third, in holding that the marriage bans' discrimination on the basis of sexual orientation warrants only rational basis review, the Sixth Circuit departed from the Seventh and Ninth Circuits, as well as from the Second Circuit's earlier decision in *Windsor*, which correctly held that such discrimination warrants heightened equal protection scrutiny. *Compare* App. 51a-53a, 56a-57a, *with Baskin*, 766 F.3d at 654 ("[M]ore than a reasonable basis is required because this is a case in which the challenged discrimination is . . . 'along suspect lines.'" (citation omitted)); *Latta*, 2014 WL 4977682, at *4 ("In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation."

(quotations and citation omitted)); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). The Sixth Circuit is the only federal court of appeals since this Court's decision in *Windsor* to apply minimal rational basis review and accord a presumption of constitutionality to discrimination based on sexual orientation.

The considerations this Court has applied to determine whether a particular form of discrimination involves a suspect classification all point in the same direction with respect to classifications based on sexual orientation. *See generally Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-47 (1985). Lesbians and gay men as a class have historically been subjected to massive discrimination, and their sexual orientation bears no relation to their ability to contribute to society. Though not critical factors to determine heightened scrutiny, they also are distinguished by a characteristic that is immutable or so fundamental to personal identity that they should not be required to try to change it to avoid discrimination, and they continue to lack sufficient political power to protect themselves through the political process. *See Windsor*, 699 F.3d at 185.

Heightened scrutiny is also appropriate for the simple reason that an explicit gender classification appears on the face of the marriage bans, which also discriminate based on sex stereotypes regarding purportedly socially-acceptable gendered roles for men and women in marriage and childrearing. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531, 533

(1996); *Latta*, 2014 WL 4977682, at *19-22 (Berzon, J., concurring).

Fourth, the Sixth Circuit decision conflicts with the other circuit courts to address the question, which all have rejected the notion that marriage bans can be justified by a purported government interest in channeling heterosexual procreative sexual activity into marriage. App. 35a-36a. As Judge Posner concluded for the Seventh Circuit, a procreation-based justification for marriage discrimination is "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656; *Latta*, 2014 WL 4977682, at *6 (argument "runs off the rails" in suggesting that marriage's stabilizing and unifying force is unnecessary for same-sex couples or their children); *Bostic*, 760 F.3d at 381-83; *Kitchen*, 755 F.3d at 1224. Indeed, this justification is so without merit that Respondent did not even advance it in defense of Ohio's marriage bans.

Fifth, particularly troubling in its implications for our constitutional democracy and the role of federal courts as protectors of minority rights, the Sixth Circuit concluded that leaving in the hands of a state's voting majority, rather than the courts, whether and when to extend rights and protections to same-sex couples and their families is an interest in itself that justifies perpetuating the marriage bans. Here too, the Sixth Circuit departed from its sister circuits, which have recognized that this argument dangerously abdicates the judiciary's constitutional responsibility to enforce the rights of even unpopular minorities. *Kitchen*, 755 F.3d at 1229 ("the value of democratic decision-making" is a "prudential concern[]," but "the judiciary is not

empowered to pick and choose the timing of its decisions," nor can "the experimental value of federalism . . . overcome plaintiffs' rights"); *Bostic*, 760 F.3d at 378-80 ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees."); *Baskin*, 766 F.3d at 671 ("Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law."); *Latta*, 2014 WL 4977682, at *9.

The Sixth Circuit majority also departed from this Court's explicit teaching in *Windsor*, which reiterated that, while "the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States . . . *[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons.*" *Windsor*, 133 S. Ct. at 2690-91 (emphasis added); *id.* at 2692 ("The States' interest in defining and regulating the marital relation [is] *subject to constitutional guarantees*." (emphasis added)); *id.* ("DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, *subject to constitutional guarantees*, from one State to the next.") (emphasis added).

The prospect that, some day, an Ohio majority might repeal the marriage bans is cold comfort to the children of Petitioner couples and others reared by same-sex parents, who are left without legal protections for their parent-child relationships, or

even accurate birth certificates. And it provides no solace to same-sex spouses facing the end of their lives, or to grieving widows and widowers, denied the dignity of death certificates acknowledging their marriages. These families urgently need this Court's intervention. To these Americans, there is no more pressing question.

4. For signposts that we have surely reached the juncture when this nationally important civil rights question is ripe for decision by this Court, we need look no further than *Loving* and *Lawrence*. By 1967, when the Court entered the national debate over race and interracial marriage, 16 states still had anti-miscegenation laws in force—though in the 15 years prior, 14 had repealed such laws. *Loving*, 388 U.S. at 6 n.5. Rather than wait for the last of these laws to be dismantled through "democratic processes," this Court struck down the remaining state bans, holding that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

Similarly, prior to 1961, all 50 states outlawed sodomy; by 1986, 24 states maintained such laws. *Lawrence*, 539 U.S. at 572. By 2003, when this Court took up the issue and ruled in *Lawrence* that these prohibitions unconstitutionally infringed individual liberties and stigmatized lesbian and gay Americans, 13 states still had such bans in force. *Id.* at 573. This Court did not leave the rights of this minority to be finally resolved through "democratic processes," instead ruling that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

Today, 16 states still refuse recognition to the marriage rights of same-sex couples—Ohio and the three other Sixth Circuit states included. The current landscape for marriage recognition for same-sex couples thus looks much the same as it did in 1967 for interracial couples and in 2003 for same-sex intimate partners. There is no more reason the courts should abdicate their role to enforce Petitioners' constitutional rights today than existed in 1967 or 2003. Petitioners, for themselves and their children, invoke the Constitution in their own search for greater freedom, and turn to this Court for protection of the liberties denied them in the political forum.

5. Marriage is a status of profound personal and legal significance carried by two spouses as they travel throughout their lives and throughout this country. But not just the couple relies on certainty that their marital status will be respected at all times and in all places; countless third parties—ranging from family members, to employers, to creditors, to state and federal government entities—do as well. Ohio's refusal to accord respect to marital statuses conferred by sister states, condoned by the Sixth Circuit majority, breeds confusion and uncertainty well beyond Ohio's borders. The Sixth Circuit majority focused on deference to state sovereignty in the domestic relations realm, giving short shrift not only to the individual constitutional rights of the Petitioners, but also to the interstate and national implications of a state's wholesale refusal to recognize marital statuses for an entire class of people married in sister states. The Sixth Circuit's ruling impairs the ability of married same-sex couples, their families, and third parties to

interact across state lines, and offends the interests of other jurisdictions in certainty about the marital statuses and rights of same-sex spouses.

This combination of cases highlights the cradle-to-grave implications of recognition of out-of-state marriages. They involve Petitioners both who reside in Ohio but married elsewhere, and—in the Vitale-Talmas family—reside in the state where they married and adopted their child, yet have no choice but to depend on Ohio's recognition of their family for critical protections for their Ohio-born child. Ohio's marriage bans cast a long shadow, raising questions about far more than the State's sovereignty over its own citizens.

II. The Sixth Circuit Ruling Exacerbates a Split Among the Circuits on a Second Important Question, the Full Faith and Credit Due a Sister State's Adoption Decree.

The Sixth Circuit's reversal of the lower court's decision also intolerably exacerbates a split already dividing the Fifth and Tenth Circuits on a separate question—whether the Full Faith and Credit Clause requires a state to honor a judgment of adoption from the courts of a sister state for purposes of issuing a birth certificate naming both of the adopted child's same-sex parents. *Compare Adar v. Smith*, 639 F.3d 146 (5th Cir.) (en banc), *cert. denied*, 132 S. Ct. 400 (2011) (holding Louisiana not obligated to accord full faith and credit to out-of-state adoption decree for purpose of naming both fathers on their Louisiana-born adopted child's birth certificate), *with Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (holding the contrary, in Oklahoma challenge). This Court

should accept review to resolve the widening split in the circuits on this issue. Regardless of whether states like Ohio may deny recognition of marriages of same-sex couples, families headed by same-sex couples, whether married or not, must be able to rely on out-of-state judgments of adoption to safeguard their children.

Because Ohio disapproves of adoption by same-sex couples, Respondent refused to issue a corrected birth certificate identifying both of Adopted Child Doe's fathers, Joseph Vitale and David Talmas, as the Ohio-born child's parents. The State has volunteered to identify only one, but not both, of the child's parents on his birth certificate, offering only *half* faith and credit to this family. App. 115a-17a, 154a-55a. The Sixth Circuit's reversal, without comment, of the lower court's order that Ohio must enforce the adoption decree, recognize both men as parents, and issue a corrected birth certificate leaves Adopted Child Doe and other Ohio-born adopted children without the birth certificates they need to travel through life with the protection of two parents. It leaves the Vitale-Talmas family and other families like them fearful even to step foot in Ohio with their adopted child. It allows Ohio to "visit[] condemnation upon the child in order to express society's disapproval" of his parents, which this Court has held "illogical and unjust." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). And it may embolden even more states to disregard their full faith and credit obligations when it comes to same-sex couples and their families.

Like every other state, Ohio has recognized by statute that it is critical to provide adopted children

born in the state with amended birth certificates naming their adoptive parents. Ohio Rev. Code §3705.12(A)-(B). Consistent with the requirements of the Full Faith and Credit Clause, for some time, Ohio applied this statute upon receipt of an adoption decree from another state without regard to the sex or marital status of the adoptive parents. App. 154a n.i. But in recent years, the Department of Health has disregarded its obligations to give full faith and credit to out-of-state adoption decrees and denied children adopted by same-sex couples accurate amended birth certificates, based on asserted Ohio public policy prohibiting adoption by unmarried couples. *Id.*

The district court correctly ruled that "[t]his backward evolution in Ohio" violates the guarantee of full faith and credit. App. 154a-55a n.i. This Court has long made clear that states cannot disregard foreign judgments based on their own public policy preferences. *Baker v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998) ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*" (citation omitted)); *id.* at 243 (Kennedy, J., concurring) ("We have often recognized the second State's obligation to give effect to another State's judgments even when the law underlying those judgments contravenes the public policy of the second State."). Instead, the Full Faith and Credit Clause "ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demanded it." *Estin v. Estin*, 334 U.S. 541, 546 (1948).

The Sixth Circuit's alignment with the Fifth Circuit, rather than the Tenth Circuit, further erodes the bulwark of the Full Faith and Credit Clause for same-sex couples who depend on the enforceability of adoption and other judicial decrees by states whose public policies remain inhospitable to their families. The rulings of the Fifth and now Sixth Circuits undercut key guarantees that underlie our federal system of government and that knit the states into one nation.

Worst of all, the Sixth Circuit's reversal falls hardest on a little boy. Petitioner Adopted Child Doe, unlike other Ohio-born children, is denied something as basic, yet critical, as a birth certificate that simply names his two parents.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their joint petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0275p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 14-1341; 3057; 3464; 5291; 5297; 5818

14-1341

APRIL DEBOER, et al.,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, Governor, State of Michigan, in his official capacity, et al.,

Defendants-Appellants.

14-3057

JAMES OBERGEFELL, et al.,

Plaintiffs-Appellees,

v.

RICHARD HODGES, Director of the Ohio Department of Health, in his official capacity,

Defendant-Appellant.

14-3464

BRITTANI HENRY, et al.,

Plaintiffs-Appellees,

v.

RICHARD HODGES, Director of the Ohio Department of Health, in his official capacity,

Defendant-Appellant.

14-5291

GREGORY BOURKE, et al.,

Plaintiffs-Appellees,

v.

STEVE BESHEAR, Governor, Commonwealth of Kentucky, in his official capacity,

Defendant-Appellant.

14-5297

VALERIA TANCO, et al.,

Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, Governor, State of Tennessee, in his official capacity, et al.,

Defendants-Appellants.

14-5818

TIMOTHY LOVE, et al.,

Plaintiffs / Intervenors-Appellees,

v.

STEVE BESHEAR, Governor, Commonwealth of Kentucky, in his official capacity,

Defendant-Appellant.

14-1341

Appeal from the United States District Court for the Eastern District of Michigan at Detroit; No. 2:12-cv-10285—Bernard A. Friedman, District Judge.

14-3057 & 14-3464

Appeals from the United States District Court for the Southern District of Ohio at Cincinnati; Nos. 1:13-cv-00501 & 1:14-cv-00129—Timothy S. Black, District Judge.

14-5291 & 14-5818

Appeals from the United States District Court for the Western District of Kentucky at Louisville; No. 3:13-cv-00750—John G. Heyburn II, District Judge.

14-5297

Appeal from the United States District Court for the Middle District of Tennessee at Nashville; No. 3:13-cv-01159—Aleta Arthur Trauger, District Judge.

Argued: August 6, 2014

Decided and Filed: November 6, 2014

Before: DAUGHTREY, SUTTON and COOK, Circuit Judges.

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SUTTON, J., delivered the opinion of the court, in which COOK, J., joined.
DAUGHTREY, J. (pp. 43–64), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen. That would not have seemed likely as recently as a dozen years ago. For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world.

But things change, sometimes quickly. Since 2003, nineteen States and the District of Columbia have expanded the definition of marriage to include gay couples, some through state legislation, some through initiatives of the people, some through state court decisions, and some through the actions of state governors and attorneys general who opted not to appeal adverse court decisions. Nor does this momentum show any signs of slowing. Twelve of the nineteen States that now recognize gay marriage did so in the last couple of years. On top of that, four federal courts of appeals have compelled several

other States to permit same-sex marriages under the Fourteenth Amendment.

What remains is a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring all States in the Circuit to extend the definition of marriage to encompass gay couples. Process and structure matter greatly in American government. Indeed, they may be the most reliable, liberty- assuring guarantees of our system of government, requiring us to take seriously the route the United States Constitution contemplates for making such a fundamental change to such a fundamental social institution.

Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. What we have authority to decide instead is a legal question: Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?

Through a mixture of common law decisions, statutes, and constitutional provisions, each State in the Sixth Circuit has long adhered to the traditional definition of marriage. Sixteen gay and lesbian couples claim that this definition violates their

rights under the Fourteenth Amendment. The circumstances that gave rise to the challenges vary. Some involve a birth, others a death. Some involve concerns about property, taxes, and insurance, others death certificates and rights to visit a partner or partner's child in the hospital. Some involve a couple's effort to obtain a marriage license within their State, others an effort to achieve recognition of a marriage solemnized in another State. All seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?

I.

Michigan. One case comes from Michigan, where state law has defined marriage as a relationship between a man and a woman since its territorial days. *See* An Act Regulating Marriages § 1 (1820), *in* 1 *Laws of the Territory of Michigan* 646, 646 (1871). The State reaffirmed this view in 1996 when it enacted a law that declared marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. In 2004, after the Massachusetts Supreme Judicial Court invalidated the Commonwealth's prohibition on same-sex marriage, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), nearly fifty-nine percent of Michigan voters opted to constitutionalize the State's definition of marriage. "To secure and preserve the benefits of

marriage for our society and for future generations of children," the amendment says, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

April DeBoer and Jayne Rowse, a lesbian couple living in Michigan, challenge the constitutionality of this definition. Marriage was not their first objective. DeBoer and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children. Their initial complaint alleged that Michigan's adoption laws violated the Equal Protection Clause of the Fourteenth Amendment. The State moved to dismiss the lawsuit for lack of standing, and the district court tentatively agreed. Rather than dismissing the action, the court "invit[ed the] plaintiffs to seek leave to amend their complaint to . . . challenge" Michigan's laws denying them a marriage license. *DeBoer* R. 151 at 3. DeBoer and Rowse accepted the invitation and filed a new complaint alleging that Michigan's marriage laws violated the due process and equal protection guarantees of the Fourteenth Amendment.

Both sets of parties moved for summary judgment. The district court concluded that the dispute raised "a triable issue of fact" over whether the "rationales" for the Michigan laws furthered "a legitimate state interest," and it held a nine-day trial on the issue. *DeBoer* R. 89 at 4, 8. The plaintiffs' experts testified that same-sex couples raise children as well as opposite-sex couples, and that denying marriage to same-sex couples creates

instabilities for their children and families. The defendants' experts testified that the evidence regarding the comparative success of children raised in same-sex households is inconclusive. The district court sided with the plaintiffs. It rejected all of the State's bases for its marriage laws and concluded that the laws failed to satisfy rational basis review.

Kentucky. Two cases challenge two aspects of Kentucky's marriage laws. Early on, Kentucky defined marriage as "the union of a man and a woman." *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *see* An Act for Regulating the Solemnization of Marriages § 1, 1798 Ky. Acts 49, 49–50. In 1998, the Kentucky legislature codified the common law definition. The statute says that "'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Ky. Rev. Stat. § 402.005. In 2004, the Kentucky legislature proposed a constitutional amendment providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Ky. Const. § 233A. Seventy-four percent of the voters approved the amendment.

Two groups of plaintiffs challenge these Kentucky laws. One group, the fortuitously named *Love* plaintiffs, challenges the Commonwealth's marriage-licensing law. Two couples filed that lawsuit: Timothy Love and Lawrence Ysunza, along with Maurice Blanchard and Dominique James.

Both couples claim that the Fourteenth Amendment prohibits Kentucky from denying them marriage licenses.

The other group, the *Bourke* plaintiffs, challenges the ban on recognizing out-of-state same-sex marriages. Four same-sex couples filed the lawsuit: Gregory Bourke and Michael DeLeon; Jimmy Meade and Luther Barlowe; Randell Johnson and Paul Campion; and Kimberly Franklin and Tamera Boyd. All four couples were married outside Kentucky, and they contend that the State's recognition ban violates their due process and equal protection rights. Citing the hardships imposed on them by the recognition ban—loss of tax breaks, exclusion from intestacy laws, loss of dignity—they seek to enjoin its enforcement.

The district court ruled for the plaintiffs in both cases. In *Love*, the court held that the Commonwealth could not justify its definition of marriage on rational basis grounds. It also thought that classifications based on sexual orientation should be subjected to intermediate scrutiny, which the Commonwealth also failed to satisfy. In *Bourke*, the court invalidated the recognition ban on rational basis grounds.

Ohio. Two cases challenge Ohio's refusal to recognize out-of-state same-sex marriages. Ohio also has long adhered to the traditional definition of marriage. *See* An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; *Carmichael v. State*, 12 Ohio St. 553, 560 (1861). It reaffirmed this definition in 2004, when the legislature passed a Defense of Marriage Act, which says that marriage "may only be entered into by one man and one

woman." Ohio Rev. Code § 3101.01(A). "Any marriage entered into by persons of the same sex in any other jurisdiction," it adds, "shall be considered and treated in all respects as having no legal force or effect." *Id.* § 3101.01(C)(2). Later that same year, sixty-two percent of Ohio voters approved an amendment to the Ohio Constitution along the same lines. As amended, the Ohio Constitution says that Ohio recognizes only "a union between one man and one woman" as a valid marriage. Ohio Const. art. XV, § 11.

Two groups of plaintiffs challenge these Ohio laws. The first group, the *Obergefell* plaintiffs, focuses on one application of the law. They argue that Ohio's refusal to recognize their out-of-state marriages on Ohio-issued death certificates violates due process and equal protection. Two same-sex couples in long-term, committed relationships filed the lawsuit: James Obergefell and John Arthur; and David Michener and William Herbert Ives. All four of them are from Ohio and were married in other States. When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates. Robert Grunn, a funeral director, joined the lawsuit, asking the court to protect his right to recognize same-sex marriages on other death certificates.

The second group, the *Henry* plaintiffs, raises a broader challenge. They argue that Ohio's refusal to recognize out-of-state marriages between same-sex couples violates the Fourteenth

Amendment no matter what marital benefit is affected. The *Henry* case involves four same-sex couples, all married in other States, who want Ohio to recognize their marriages on their children's birth certificates. Three of the couples (Brittani Henry and Brittni Rogers; Nicole and Pam Yorksmith; Kelly Noe and Kelly McCracken) gave birth to children in Ohio and wish to have both of their names listed on each child's birth certificate rather than just the child's biological mother. The fourth couple (Joseph Vitale and Robert Talmas) lives in New York and adopted a child born in Ohio. They seek to amend their son's Ohio birth certificate so that it lists both of them as parents.

The district court granted the plaintiffs relief in both cases. In *Obergefell*, the court concluded that the Fourteenth Amendment protects a fundamental right to keep existing marital relationships intact, and that the State failed to justify its law under heightened scrutiny. The court likewise concluded that classifications based on sexual orientation deserve heightened scrutiny under equal protection, and that Ohio failed to justify its refusal to recognize the couples' existing marriages. Even under rational basis review, the court added, the State came up short. In *Henry*, the district court reached many of the same conclusions and expanded its recognition remedy to encompass all married same-sex couples and all legal incidents of marriage under Ohio law.

Tennessee. The Tennessee case is of a piece with the two Ohio cases and one of the Kentucky cases, as it too challenges the State's same-sex-marriage recognition ban. Tennessee has always

defined marriage in traditional terms. *See* An Act Concerning Marriages § 3 (1741), *in Public Acts of the General Assembly of North-Carolina and Tennessee* 46, 46 (1815). In 1996, the Tennessee legislature reaffirmed "that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn. Code Ann. § 36-3-113(a). In 2006, the State amended its constitution to incorporate the existing definition of marriage. *See* Tenn. Const. art. XI, § 18. Eighty percent of the voters supported the amendment.

Three same-sex couples, all in committed relationships, challenge the recognition ban: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Johno Espejo and Matthew Mansell. All three couples were legally married in other States. The district court preliminarily enjoined the law. Relying on district court decisions within the circuit and elsewhere, the court concluded that the couples likely would show that Tennessee's ban failed to satisfy rational basis review. The remaining preliminary injunction factors, the court held, also weighed in the plaintiffs' favor.

All four States appealed the decisions against them.

II.

Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States to expand the definition of marriage

to include same-sex couples? The Michigan appeal (*DeBoer*) presents this threshold question, and so does one of the Kentucky appeals (*Love*). Caselaw offers many ways to think about the issue.

A.

Perspective of an intermediate court. Start with a recognition of our place in the hierarchy of the federal courts. As an "inferior" court (the Constitution's preferred term, not ours), a federal court of appeals begins by asking what the Supreme Court's precedents require on the topic at hand. Just such a precedent confronts us.

In the early 1970s, a Methodist minister married Richard Baker and James McConnell in Minnesota. Afterwards, they sought a marriage license from the State. When the clerk of the state court denied the request, the couple filed a lawsuit claiming that the denial of their request violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court rejected both claims. As for the due process claim, the state court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause . . . is not a charter for restructuring it by judicial legislation." *Id.* As for the equal protection claim, the court reasoned: "[T]he state's classification of persons authorized to marry" does

not create an "irrational or invidious discrimination. . . . [T]hat the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate . . . [creates only a] theoretically imperfect [classification] . . . [and] 'abstract symmetry' is not demanded by the Fourteenth Amendment." *Id.* at 187. The Supreme Court's decision four years earlier in *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated Virginia's ban on interracial marriages, did not change this conclusion. "[I]n commonsense and in a constitutional sense," the state court explained, "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187.

Baker and McConnell appealed to the United States Supreme Court. The Court rejected their challenge, issuing a one-line order stating that the appeal did not raise "a substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972). This type of summary decision, it is true, does not bind the Supreme Court in later cases. But it does confine lower federal courts in later cases. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S. 332, 345 (1975) (internal quotation marks omitted). The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the

Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

But that was then; this is now. And now, claimants insist, must account for *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law. Yet *Windsor* does not answer today's question. The decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see it. To respect one decision does not slight the other. Nor does *Windsor*'s reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id.* at 2691–92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id.* at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide. *Id.* at 2692, 2695. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to . . . lawful marriages" already protected by some of

the States. *Id.* at 2696. Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), prevented it from considering the validity of state marriage laws. Saying that the Court declined in *Hollingsworth* to overrule *Baker* openly but decided in *Windsor* to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.

Even if *Windsor* did not overrule *Baker* by name, the claimants point out, lower courts still may rely on "doctrinal developments" in the aftermath of a summary disposition as a ground for not following the decision. *Hicks*, 422 U.S. at 344. And *Windsor*, they say, together with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), permit us to cast *Baker* aside. But this reading of "doctrinal developments" would be a groundbreaking development of its own. From the perspective of a lower court, summary dispositions remain "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see Hicks*, 422 U.S. at 343–45. And the Court has told us to treat the two types of decisions, whether summary dispositions or full-merits decisions, the same, "prevent[ing] lower courts" in both settings "from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Lest doubt remain, the Court has also told us not to ignore its decisions even when they are in tension with a new line of cases. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of

Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*). Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court. In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here. *Windsor* as shown does not mention *Baker*, and it clarifies that its "opinion and holding" do not govern the States' authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome. The one invalidates a State's criminal antisodomy law and explains that the case "does not involve . . . formal recognition" of same-sex relationships. *Lawrence*, 539 U.S. at 578. The other invalidates a "[s]weeping" and "unprecedented" state law that prohibited local communities from passing laws that protect citizens from discrimination based on sexual orientation. *Romer*, 517 U.S. at 627, 633, 635–36.

That brings us to another one-line order. On October 6, 2014, the Supreme Court "denied" the "petitions for writs of certiorari" in 1,575 cases, seven of which arose from challenges to decisions of the Fourth, Seventh, and Tenth Circuits that recognized a constitutional right to same-sex marriage. But this kind of action (or inaction) "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). "The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal citation omitted). Just as the Court's three decisions to stay those same court of appeals decisions over the past year, all without a registered dissent, did not end the debate on this issue, so too the Court's decision to deny certiorari in all of these appeals, all without a registered dissent, does not end the debate either. A decision not to decide is a decision not to decide.

But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not. Even if we grant the premise and assume that same-sex marriage will be recognized one day in all fifty States, that does not tell us how— whether through the courts or through democracy. And, if through the courts, that does not tell us why—whether through one theory of constitutional invalidity or another. Four courts of appeals thus far have recognized a constitutional right to same-sex marriage. They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in

the same decision. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (rational basis, animus); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental rights); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same). The Court's certiorari denials tell us nothing about the democracy-versus-litigation path to same-sex marriage, and they tell us nothing about the validity of any of these theories. If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one, as several other judges have concluded as well. *See Bostic*, 760 F.3d at 385–98 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1230–40 (Kelly, J., concurring in part and dissenting in part); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253-PG, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

There are many ways, as these lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.

B.

Original meaning. All Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it. If we think of the Constitution as a covenant between the governed and the governors, between the people and their political leaders, it is easy to appreciate the force of this basic norm of constitutional interpretation—that the originally understood meaning of the charter generally will be the lasting meaning of the charter. When two individuals sign a contract to sell a house, no one thinks that, years down the road, one party to the contract may change the terms of the deal. That is why the parties put the agreement in writing and signed it publicly—to prevent changed perceptions and needs from changing the guarantees in the agreement. So it normally goes with the Constitution: The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur—unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so. *See* U.S. Const. art. V. If American lawyers in all manner of settings still invoke the original meaning of Magna Carta, a Charter for England in 1215, surely it is not too much to ask that they (and we) take seriously the original meaning of the United States Constitution, a Charter for this country in 1789. Any other approach, too lightly followed, converts federal judges from interpreters of the document into newly commissioned authors of it.

Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–25 (1819); *Legal Tender Cases*, 79 U.S. 457, 536–38 (1870); *Myers v. United States*, 272 U.S. 52, 110–39 (1926); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25 (1995); *Washington v. Glucksburg*, 521 U.S. 702, 710–19 (1997); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004); *Boumediene v. Bush*, 553 U.S. 723, 739–46 (2008); *Giles v. California*, 554 U.S. 353, 358–61 (2008); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008).

In trying to figure out the original meaning of a provision, it is fair to say, the line between interpretation and evolution blurs from time to time. That is an occupational hazard for judges when it comes to old or generally worded provisions. Yet that knotty problem does not confront us. Yes, the Fourteenth Amendment is old; the people ratified it in 1868. And yes, it is generally worded; it says: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Nobody in this case, however, argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.

Tradition reinforces the point. Only months ago, the Supreme Court confirmed the significance of long-accepted usage in constitutional

interpretation. In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–20 (2014). In another case, the Court interpreted the Recess Appointments Clause based in part on long-accepted usage. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014). Applied here, this approach permits today's marriage laws to stand until the democratic processes say they should stand no more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

C.

Rational basis review. Doctrine leads to the same place as history. A first requirement of any law, whether under the Due Process or Equal Protection Clause, is that it rationally advance a legitimate government policy. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Two words ("judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)) and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process," *Vance*, 440 U.S. at 97) tell us all we need to know about the light touch judges should use in reviewing laws under this standard. So long as judges can conceive of some "plausible" reason for the law—*any* plausible reason, even one that did not motivate the legislators who

enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17–18 (1992).

A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States. Hesitant, yes; but still a rational basis, some rational basis, must exist for the definition. What is it? Two at a minimum suffice to meet this low bar. One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children? That we rarely think about these questions nowadays shows only how far we have come and how relatively stable our society is, not that States have no explanation for creating such rules in the first place.

Once one accepts a need to establish such ground rules, and most especially a need to create stable family units for the planned and unplanned

creation of children, one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them. One way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means. People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative. And governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues. *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

No doubt, that is not the only way people view marriage today. Over time, marriage has come to serve another value—to solemnize relationships characterized by love, affection, and commitment. Gay couples, no less than straight couples, are capable of sharing such relationships. And gay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment. All of this supports the policy argument made by many that marriage laws

should be extended to gay couples, just as nineteen States have done through their own sovereign powers. Yet it does not show that the States, circa 2014, suddenly must look at this policy issue in just one way on pain of violating the Constitution.

The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question. *Id.* In a modern sense, crystallized at some point in the last ten years, many people now critique state marriage laws for doing too little—for being underinclusive by failing to extend the definition of marriage to gay couples. Fair enough. But rational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges, even a better way supported by evidence and, in the Michigan case, by judicial factfinding. If legislative choices may rest on "rational speculation unsupported by evidence or empirical data," *Beach Commc'ns*, 508 U.S. at 315, it is hard to see the point of premising a ruling of unconstitutionality on factual findings made by one unelected federal judge that favor a different policy. Rational basis review does not empower federal courts to "subject" legislative line- drawing to "courtroom" factfinding designed to show that legislatures have done too much or too little. *Id.*

What we are left with is this: By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing

offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

To take another rational explanation for the decision of many States not to expand the definition of marriage, a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries. That is not preserving tradition for its own sake. No one here claims that the States' original definition of marriage was unconstitutional when enacted. The plaintiffs' claim is that the States have acted irrationally in standing by the traditional definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time. As a matter of state law, the possibility of gay marriage became real in 2003 with the Massachusetts Supreme Judicial Court's decision in *Goodridge*. Eleven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage. Eleven years indeed is not even the right timeline. The fair question is whether in 2004, *one* year after *Goodridge*, Michigan voters could stand by the traditional definition of marriage. How can we say that the voters acted irrationally for sticking

with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage? A State still assessing how this has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere. Even today, the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know. A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems.

In accepting these justifications for the four States' marriage laws, we do not deny the foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time. States will hand some people a marriage license no matter how often they have divorced or remarried, apparently on the theory that practice makes perfect. States will not even prevent an individual from remarrying the same person three or four times, where practice no longer seems to be the issue. With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage, at least until the State's no-fault divorce laws allow them to exit the partnership freely. And States allow couples to continue procreating no matter how little stability, safety, and love they provide the children they already have. Nor has unjustified sanctimony

stayed off the stage when it comes to marital legislation—with monogamists who "do not monog" criticizing alleged polygamists who "do not polyg." *See* Paul B. Beers, *Pennsylvania Politics Today and Yesterday* 51 (1980).

How, the claimants ask, could *anyone* possibly be unworthy of this civil institution? Aren't gay and straight couples both capable of honoring this civil institution in some cases and of messing it up in others? All of this, however, proves much too much. History is replete with examples of love, sex, and marriage tainted by hypocrisy. Without it, half of the world's literature, and three-quarters of its woe, would disappear. Throughout, we have never leveraged these inconsistencies about deeply personal, sometimes existential, views of marriage into a ground for constitutionalizing the field. Instead, we have allowed state democratic forces to fix the problems as they emerge and as evolving community mores show they should be fixed. Even if we think about today's issue and today's alleged inconsistencies solely from the perspective of the claimants in this case, it is difficult to call that formula, already coming to terms with a new view of marriage, a failure.

Any other approach would create line-drawing problems of its own. Consider how plaintiffs' love-and-commitment definition of marriage would fare under their own rational basis test. Their definition does too much because it fails to account for the reality that no State in the country requires couples, whether gay or straight, to be in love. Their definition does too little because it fails to account for plural marriages, where there is no

reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point. What they might say they cannot: They might say that tradition or community mores provide a rational basis for States to stand by the monogamy definition of marriage, but they cannot say that because that is exactly what they claim is illegitimate about the States' male-female definition of marriage. The predicament does not end there. No State is free of marriage policies that go too far in some directions and not far enough in others, making all of them vulnerable—if the claimants' theory of rational basis review prevails.

Several cases illustrate just how seriously the federal courts must take the line-drawing deference owed the democratic process under rational basis review. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and many gay

couples do)? *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012), says that if a city cancels a tax, the bureaucratic hassle of issuing refunds entitles it to keep money already collected from citizens who paid early. If administrative convenience amounts to an adequate public purpose, why not a rough sense of social stability? More deferential still, *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), concludes that a State's interest in maintaining close ties among those who steer ships in its ports justifies denying pilotage licenses to anyone who isn't a friend or relative of an incumbent pilot. Can we honestly say that traditional marriage laws involve more irrationality than *nepotism*?

The debate over marriage of course has another side, and we cannot deny the costs to the plaintiffs of allowing the States to work through this profound policy debate. The traditional definition of marriage denies gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law. In addition to depriving them of this status, it deprives them of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children. Do the benefits of standing by the traditional definition of marriage make up for these costs? The question demands an answer—but from elected legislators, not life-tenured judges. Our task under the Supreme Court's precedents is to decide whether the law has some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side. Respect for

democratic control over this traditional area of state expertise ensures that "a statewide deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage" can have free and reasonable rein. *Windsor*, 133 S. Ct. at 2689.

D.

Animus. Given the broad deference owed the States under the democracy-reinforcing norms of rational basis review, the cases in which the Supreme Court has struck down a state law on that basis are few. When the Court has taken this step, it usually has been due to the novelty of the law and the targeting of a single group for disfavored treatment under it. In one case, a city enacted a new zoning code with the none-too-subtle purpose of closing down a home for the intellectually disabled in a neighborhood that apparently wanted nothing to do with them. The reality that the code applied only to homes for the intellectually disabled—and not to other dwellings such as fraternity houses—led the Court to invalidate the regulation on the ground that the city had based it upon "an irrational prejudice against the mentally retarded." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). In another case, a statewide initiative denied gays, and gays alone, access to the protection of the State's existing antidiscrimination laws. The novelty of the law, coupled with the distance between the reach of the law and any legitimate interest it might serve, showed that the law was "born of animosity toward" gays and suggested a design to make gays "unequal to everyone else." *Romer*, 517 U.S. at 634–35.

None of the statewide initiatives at issue here fits this pattern. The four initiatives, enacted between 2004 and 2006, codified a long-existing, widely held social norm already reflected in state law. "[M]arriage between a man and a woman," as the Court reminded us just last year, "had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

Neither was the decision to place the definition of marriage in a State's constitution unusual, nor did it otherwise convey the kind of malice or unthinking prejudice the Constitution prohibits. Nineteen States did the same thing during that period. Human Rights Campaign Found., *Equality from State to State 2006*, at 13–14 (2006), *available at* http://s3.amazonaws.com/hrc-assets//files/assets/resources/StateToState2007.pdf. And if there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about. If that is animus, the term has no useful meaning.

Who in retrospect can blame the voters for having this fear? By then, several state courts had altered their States' traditional definitions of marriage under the States' constitutions. Since then, more have done the same. Just as state judges have the authority to construe a state constitution as they see fit, so do the people have the right to overrule such decisions or preempt them as they see fit. Nor is there anything static about this process. In some States, the people have since re-amended

their constitutions to broaden the category of those eligible to marry. In other States, the people seemed primed to do the same but for now have opted to take a wait- and-see approach of their own as federal litigation proceeds. *See, e.g.*, Wesley Lowery, *Same- Sex Marriage Is Gaining Momentum, but Some Advocates Don't Want It on the Ballot in Ohio*, Wash. Post (June 14, 2014), http://www.washingtonpost.com/politics/same-sex-marriage-is-gaining-momentum-but-ohio-advocates-dont-want-it-on-the-ballot/2014/06/14/a090452a-e77e-11e3-afc6-a1dd9407abcf_story.html (explaining that Ohio same-sex marriage advocates opted not to place the question on the 2014 state ballot despite collecting nearly twice the number of required signatures). What the Court recently said about another statewide initiative that people care passionately about applies with equal vigor here: "Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014). "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

What of the possibility that other motivations affected the amendment process in the four States? If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence. The number of people who supported each

initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse. In addition to the proper role of the courts in a democracy, many other factors presumably influenced the voters who supported *and* opposed these amendments: that some politicians favored the amendment and others opposed it; that some faith groups favored the amendment and others opposed it; that some thought the amendment would strengthen families and others thought it would weaken them or were not sure; that some thought the amendment would be good for children and others thought it would not be or were not sure; and that some thought the amendment would preserve a long-established definition of marriage and others thought it was time to accommodate gay couples. Even a rough sense of morality likely affected voters, with some thinking it immoral to exclude gay couples and others thinking the opposite. For most people, whether for or against the amendment, the truth of why they did what they did is assuredly complicated, making it impossible to pin down any one consideration, as opposed to a rough aggregation of factors, as motivating them. How in this setting can we indict the 2.7 million Michigan voters who supported the amendment in 2004, less than *one year* after the *first* state supreme court recognized a constitutional right to gay marriage, for favoring the amendment for prejudicial reasons and for prejudicial reasons alone? Any such conclusion cannot be squared with the benefit of the doubt customarily given voters and legislatures under rational basis review. Even the gay-rights community, remember, was not of one mind about

taking on the benefits and burdens of marriage until the early 1990s. *See* George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 58, 88 (2004); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 48–52 (2013). A decade later, a State's voters should not be taken to task for failing to be of one mind about the issue themselves.

Some equanimity is in order in assessing the motives of voters who invoked a constitutionally respected vehicle for change and for resistance to change: direct democracy. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). Just as gay individuals are no longer abstractions, neither should we treat States as abstractions. Behind these initiatives were real people who teach our children, create our jobs, and defend our shores. Some of these people supported the initiative in 2004; some did not. It is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families. "Tolerance," like respect and dignity, is best traveled on a "two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). If there is a dominant theme to the Court's cases in this area, it is to end otherness, not to create new others.

All of this explains why the Court's decisions in *City of Cleburne* and *Romer* do not turn on reading the minds of city voters in one case or of statewide initiative supporters in the other. They turn on asking whether anything but prejudice to the affected class could explain the law. *See City of*

Cleburne, 473 U.S. at 450; *Romer*, 517 U.S. at 635. No such explanations existed in those cases. Plenty exist here, as shown above and as recognized by many others. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("Unlike the moral disapproval of same-sex relations[,] . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."); *Bishop*, 760 F.3d at 1104–09 (Holmes, J., concurring) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006) (enactment not "'inexplicable by anything but animus' towards same-sex couples"); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (no reason to "infer antipathy"); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (those who favor the traditional definition are not "irrational, ignorant or bigoted"); *Andersen v. King Cnty.*, 138 P.3d 963, 981 (Wash. 2006) (en banc) ("the only reason" for the law was not "anti-gay sentiment").

One other point. Even if we agreed with the claimants that the nature of these state constitutional amendments, and the debates surrounding them, required their invalidation on animus grounds, that would not give them what they request in their complaints: the right to same-sex marriage. All that the invalidation of the amendments would do is return state law to where it had always been, a status quo that in all four States included state statutory and common law definitions of marriage applicable to one man and one woman—definitions that no one claims were motivated by ill will. The elimination of the state constitutional provisions, it is true, would allow individuals to challenge the four States' other

marital laws on state constitutional grounds. No one filed such a challenge here, however.

E.

Fundamental right to marry. Under the Due Process Clause, courts apply more muscular review—"strict," "rigorous," usually unforgiving, scrutiny—to laws that impair "fundamental" rights. In considering the claimants' arguments that they have a fundamental right to marry each other, we must keep in mind that something can be fundamentally important without being a fundamental right under the Constitution. Otherwise, state regulations of many deeply important subjects—from education to healthcare to living conditions to decisions about when to die— would be subject to unforgiving review. They are not. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (public education); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (healthcare); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (housing); *Glucksberg*, 521 U.S. at 728 (right to die). Instead, the question is whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process. More precisely, the test is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citations omitted). That requirement often is met by placing the right in the Constitution, most obviously in (most of) the guarantees in the Bill of Rights. *See id.* at 720. But the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution. That route for

recognizing a fundamental right to same-sex marriage does not exist.

That leaves the other option—that, even though a proposed right to same-sex marriage does not appear in the Constitution, it turns on bedrock assumptions about liberty. This too does not work. The first state high court to redefine marriage to include gay couples did not do so until 2003 in *Goodridge*.

Matters do not change because *Loving v. Virginia*, 388 U.S. 1 (1967), held that "marriage" amounts to a fundamental right. When the Court decided *Loving*, "marriage between a man and a woman no doubt [was] thought of . . . as essential to the very definition of that term." *Windsor*, 133 S. Ct. at 2689. In referring to "marriage" rather than "opposite-sex marriage," *Loving* confirmed only that "opposite-sex marriage" would have been considered redundant, not that marriage included same-sex couples. *Loving* did not change the definition. That is why the Court said marriage is "fundamental to our very existence and survival," 388 U.S. at 12, a reference to the procreative definition of marriage. Had a gay African-American male and a gay Caucasian male been denied a marriage license in Virginia in 1968, would the Supreme Court have held that Virginia had violated the Fourteenth Amendment? No one to our knowledge thinks so, and no Justice to our knowledge has ever said so. The denial of the license would have turned not on the races of the applicants but on a request to change the definition of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right,

how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.

A similar problem confronts the claimants' reliance on other decisions treating marriage as a fundamental right, whether in the context of a statute denying marriage licenses to fathers who could not pay child support, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or a regulation restricting prisoners' ability to obtain marriage licenses, *Turner v. Safley*, 482 U.S. 78, 94–95 (1987). It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required the State to permit him to marry a gay partner. When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning.

No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.

The upshot of fundamental-rights status, keep in mind, is strict-scrutiny status, subjecting all state eligibility rules for marriage to rigorous, usually unforgiving, review. That makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a marriage. Start with the *duration* of a marriage. For some, marriage is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. *See* Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79, 90. The Court has never subjected these policy fits and starts about who may *leave* a marriage to strict scrutiny.

Consider also the *number* of people eligible to marry. As late as the eighteenth century, "[t]he predominance of monogamy was by no means a foregone conclusion," and "[m]ost of the peoples and cultures around the globe" had adopted a different system. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 9 (2000). Over time, American officials wove monogamy into marriage's fabric. Beginning in the nineteenth century, the federal government "encouraged or forced" Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; *see Reynolds v. United States*, 98 U.S. 145 (1878). The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex marriage not apply to plural marriages?

Consider finally the *nature* of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid-1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. *See* Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of marriage between cousins, a union deemed "desirable in many parts of the world"; indeed, around "10 percent of marriages worldwide are between people who are second cousins or closer." Sarah Kershaw, *Living Together: Shaking Off the Shame*, N.Y. Times (Nov. 25, 2009), http://www.nytimes.com/2009/11/26/garden/26cousins.html. Even in the United States, cousin marriage was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. *See* Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi*, 998 So. 2d 731, 749 (La. Ct. App. 2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so.

F.

Discrete and insular class without political power. A separate line of cases, this one under the Equal Protection Clause, calls for heightened review

of laws that target groups whom legislators have singled out for unequal treatment in the past. This argument faces an initial impediment. Our precedents say that rational basis review applies to sexual-orientation classifications. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir. 2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997).

There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades. There are ample reasons for staying the course. Courts consider four rough factors in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: whether the group has been historically victimized by governmental discrimination; whether it has a defining characteristic that legitimately bears on the classification; whether it exhibits unchanging characteristics that define it as a discrete group; and whether it is politically powerless. *See Rodriguez*, 411 U.S. at 28.

We cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens. Stonewall, Anita Bryant's uninvited answer to the question "Who are we to judge?", unequal enforcement of antisodomy laws between gay and straight partners, Matthew Shepard, and the language of insult directed at gays and others make

it hard for anyone to deny the point. But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." *Lawrence*, 539 U.S. at 570. This order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage in the same way that we can infer from history that prejudice against African Americans led to laws against miscegenation. The usual leap from history of discrimination to intensification of judicial review does not work.

Windsor says nothing to the contrary. In arguing otherwise, plaintiffs mistake *Windsor*'s avoidance of one federalism question for avoidance of federalism altogether. Here is the key passage:

> Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital

> relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"

Windsor, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). Plaintiffs read these words (and others that follow) as an endorsement of heightened review in today's case, pointing to the first two sentences as proof that individual dignity, not federalism, animates *Windsor*'s holding.

Yet federalism permeates both parts of this passage and both parts of the opinion. *Windsor* begins by expressing doubts about whether Congress has the delegated power to enact a statute like DOMA at all. But instead of resolving the case on the far-reaching enumerated- power ground, it resolves the case on the narrower *Romer* ground—that anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot. Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-respected authority to define the marital relation, including by "enhanc[ing] the recognition, dignity, and protection" of gay and lesbian couples. *Id.* Today's case involves no such "divest[ing]"/

"depriv[ing]"/"undermin[ing]" of a marriage status granted through a State's authority over domestic relations within its borders and thus provides no basis for inferring that the purpose of the state law was to "impose a disadvantage"/"a separate status"/"a stigma" on gay couples. *Id.* at 2692–95. When the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring), they did so to *enhance* liberty, not to allow the National Government to *divest* liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power. What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it. The only thing that has changed is the *willingness* of many States over the last eleven years to expand the definition of marriage to encompass gay couples.

Any other reading of *Windsor* would require us to subtract key passages from the opinion and add an inverted holding. The Court noted that New York "without doubt" had the power under its traditional authority over marriage to extend the definition of marriage to include gay couples and that Congress had no power to enact "unusual" legislation that interfered with the States' long-held authority to define marriage. *Windsor*, 133 S. Ct. at 2692–93. A decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago—to

use its Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead. That would leave the States with little authority to resolve ever-changing debates about how to define marriage (and the benefits and burdens that come with it) outside the beck and call of Congress and the Court. How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

Nor, as the most modest powers of observation attest, is this a setting in which "political powerlessness" requires "extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. This is not a setting in which dysfunction mars the political process. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). And it is not a setting, most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Instead, from the claimants' perspective, we have an eleven-year record marked by nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past—if the federal courts will allow that future to take hold. Throughout that time, other advances for the claimants' cause are manifest. Nationally, "Don't Ask, Don't Tell" is gone. Locally, the Cincinnati charter amendment that prevented gay individuals from obtaining certain preferences from the city, upheld by our court in 1997, *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), is no more. The Fourteenth Amendment does not insulate influential, indeed eminently successful, interest groups from a defining attribute of all democratic initiatives—some succeed, some fail—particularly when succeeding more and failing less are in the offing.

Why, it is worth asking, the sudden change in public opinion? If there is one thing that seems to challenge hearts and minds, even souls, on this issue, it is the transition from the abstract to the concrete. If twenty-five percent of the population knew someone who was openly gay in 1985, and seventy-five percent knew the same in 2000, Klarman, *supra*, at 197, it is fair to wonder how few individuals still have not been forced to think about the matter through the lens of a gay friend or family member. *That* would be a discrete and insular minority.

The States' undoubted power over marriage provides an independent basis for reviewing the laws before us with deference rather than with

skepticism. An analogy shows why. When a *state* law targets noncitizens—a group marked by its lack of political power and its history of enduring discrimination—it must in general meet the most demanding of constitutional tests in order to survive a skirmish with a court. But when a *federal* law targets noncitizens, a mere rational basis will save it from invalidation. This disparity arises because of the Nation's authority (and the States' corresponding lack of authority) over international affairs. *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). If federal preeminence in foreign relations requires lenient review of federal immigration classifications, why doesn't state preeminence in domestic relations call for equally lenient review of state marriage definitions?

G.

Evolving meaning. If all else fails, the plaintiffs invite us to consider that "[a] core strength of the American legal system . . . is its capacity to evolve" in response to new ways of thinking about old policies. *DeBoer* Appellees' Br. at 57–58. But even if we accept this invitation and put aside the past—original meaning, tradition, time-respected doctrine—that does not take the plaintiffs where they wish to go. We could, to be sure, look at this case alongside evolving moral and policy considerations. The Supreme Court has done so before. *Lawrence*, 539 U.S. at 573. It may do so again. "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights . . . to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Why not do so here?

Even on this theory, the marriage laws do not violate the Constitution. A principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values. Freed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way. *Lawrence*, by contrast, dealt with a situation in which just thirteen States continued to prohibit sodomy, and even then most of those laws had fallen into desuetude, rarely being enforced at all. On this record, what right do we have to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage?

The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace. It follows that States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point. Not long ago American society took for granted the rough correlation between marriage and creation of new life, a vision under which limiting marriage to opposite-sex couples seemed natural. Not long from now, if current trends continue, American society may define marriage in terms of affirming mutual love, a vision under which the failure to add loving gay couples seems unfair. Today's society has begun to move past the first picture of marriage, but it has not yet developed a consensus on the second.

If, *before* a new consensus has emerged on a social issue, federal judges may decide when the time is ripe to recognize a new constitutional right, surely the people should receive some deference in deciding when the time is ripe to move from one picture of marriage to another. So far, not a single United States Supreme Court Justice in American history has written an opinion maintaining that the traditional definition of marriage violates the Fourteenth Amendment. No one would accuse the Supreme Court of acting irrationally in failing to recognize a right to same-sex marriage in 2013. Likewise, we should hesitate to accuse the States of acting irrationally in failing to recognize the right in 2004 or 2006 or for that matter today. Federal judges engaged in the inherent pacing that comes with living constitutionalism should appreciate the inherent pacing that comes with democratic majorities deciding within reasonable bounds when and whether to embrace an evolving, as opposed to settled, societal norm. The one form of pacing is akin to the other, making it anomalous for the Court to hold that the States act unconstitutionally when making reasonable pacing decisions of their own.

From time to time, the Supreme Court has looked beyond our borders in deciding when to expand the meaning of constitutional guarantees. *Lawrence*, 539 U.S. at 576. Yet foreign practice only reinforces the impropriety of tinkering with the democratic process in this setting. The great majority of countries across the world—including such progressive democracies as Australia and Finland—still adhere to the traditional definition of marriage. Even more telling, the European Court of

Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409. "The area in question," it explained in words that work just as well on this side of the Atlantic, remains "one of evolving rights with no established consensus," which means that States must "enjoy [discretion] in the timing of the introduction of legislative changes." *Id.* at 438. It reiterated this conclusion as recently as this July, declaring that "the margin of appreciation to be afforded" to States "must still be a wide one." *Hämäläinen v. Finland*, No. 37359/09, HUDOC, at *19 (Eur. Ct. H.R. July 16, 2014). Our Supreme Court relied on the European Court's gay-rights decisions in *Lawrence*. 539 U.S. at 576. What neutral principle of constitutional interpretation allows us to ignore the European Court's same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other, especially in a case designed to treat like matters alike.

Other practical considerations also do not favor the creation of a new constitutional right here. While these cases present a denial of access to many benefits, what is "[o]f greater importance" to the claimants, as they see it, "is the loss of . . . dignity and respect" occasioned by these laws. *Love* Appellees' Br. at 5. No doubt there is much to be said for "dignity and respect" in the eyes of the Constitution and its interpreters. But any loss of dignity and respect on this issue did not come from the Constitution. It came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the

problem in the first instance—and in that way "to allow the formation of consensus respecting the way the members" of a State "treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S. Ct. at 2692.

For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions. If the plaintiffs are convinced that litigation is the best way to resolve today's debate and to change heads and hearts in the process, who are we to say? Perhaps that is not the only point, however. Yes, we cannot deny thinking the plaintiffs deserve better—earned victories through initiatives and legislation and the greater acceptance that comes with them. But maybe the American people too deserve better—not just in the sense of having a say through representatives in the legislature rather than through representatives in the courts, but also in the sense of having to come face to face with the issue. Rights need not be countermajoritarian to count. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88352, 78 Stat. 241. Isn't the goal to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices? It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.

Last, but not least, federal courts never expand constitutional guarantees in a vacuum.

What one group wants on one issue from the courts today, another group will want on another issue tomorrow. The more the Court innovates under the Constitution, the more plausible it is for the Court to do still more—and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more. And while the expansion of liberal and conservative constitutional rights will solve, or at least sidestep, the amendment-difficulty problem that confronts many individuals and interest groups, it will exacerbate the judge-confirmation problem. Faith in democracy with respect to issues that the Constitution has not committed to the courts reinforces a different, more sustainable norm.

III.

Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States? That is the question presented in the two Ohio cases (*Obergefell* and *Henry*), one of the Kentucky cases (*Bourke*), and the Tennessee case (*Tanco*). Our answer to the first question goes a long way toward answering this one. If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.

The Constitution in general does not delineate when a State must apply its own laws and when it must apply the laws of another State. Neither any federal statute nor federal common law fills the gap. Throughout our history, each State has decided for

itself how to resolve clashes between its laws and laws of other sovereigns—giving rise to the field of conflict of laws. The States enjoy wide latitude in fashioning choice-of-law rules. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

The plaintiffs in these cases do not claim that refusal to recognize out-of-state gay and lesbian marriages violates the Full Faith and Credit Clause, the principal constitutional limit on state choice-of-law rules. Wisely so. The Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). If defining marriage as an opposite-sex relationship amounts to a legitimate public policy—and we have just explained that it does—the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.

The plaintiffs instead argue that failure to recognize gay marriages celebrated in other States violates the Due Process and Equal Protection Clauses. But we do not think that the invocation of these different clauses justifies a different result. As shown, compliance with the Due Process and Equal Protection Clauses in this setting requires only a rational relationship between the legislation and a legitimate public purpose. And a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State. Preservation of a State's authority to recognize, or to opt not to recognize, an out- of-state marriage preserves a State's sovereign interest in deciding for itself how

to define the marital relationship. It also discourages evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home. Were it irrational for a State to adhere to its own policy, what would be the point of the Supreme Court's repeated holdings that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own public policy"? *Id.*

Far from undermining these points, *Windsor* reinforces them. The case observes that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." 133 S. Ct. at 2691 (internal quotation marks omitted). How could it be irrational for a State to decide that the foundation of its domestic- relations law will be *its* definition of marriage, not somebody else's? *Windsor* adds that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Id.* How could it be irrational for a State to apply its definition of marriage to a couple in whose marital status the State as a sovereign has a rightful and legitimate concern?

Nor does the policy of nonrecognition trigger *Windsor*'s (or *Romer*'s) principle that unprecedented exercises of power call for judicial skepticism. States have always decided for themselves when to yield to laws of other States. Exercising this power, States often have refused to enforce all sorts of out-of-state rules on the grounds

that they contradict important local policies. *See* Restatement (First) of Conflict of Laws § 612; Restatement (Second) of Conflict of Laws § 90. Even more telling, States in many instances have refused to recognize marriages performed in other States on the grounds that these marriages depart from cardinal principles of the State's domestic-relations laws. *See* Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 283. The laws challenged here involve routine rather than anomalous uses of state power.

What of the reality that Ohio recognizes some heterosexual marriages solemnized in other States even if those marriages could not be performed in Ohio? *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958). The only reason Ohio could have for banning recognition of same-sex marriages performed elsewhere and not prohibiting heterosexual marriages performed elsewhere, the Ohio plaintiffs claim, is animus or "discrimination[] of an unusual character." *Obergefell* Appellees' Br. at 18 (quoting *Windsor*, 133 S. Ct. at 2692).

But, in making this argument, the plaintiffs misapprehend Ohio law, wrongly assuming that Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it. That is not the case. Ohio law recognizes some out-of-state marriages that could not be performed in Ohio, but not all such marriages. *See, e.g.*, *Mazzolini*, 155 N.E.2d at 208 (marriage of first cousins); *Hardin v. Davis*, 16 Ohio Supp. 19, 20 (Ohio Ct. Com. Pl. 1945) (marriage by proxy). In *Mazzolini*, the most relevant

precedent, the Ohio Supreme Court stated that a number of heterosexual marriages—ones that were "incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited"—would not be recognized in the State, even if they were valid in the jurisdiction that performed them. 155 N.E.2d at 208–09 (noting that first-cousin marriages fell outside this rule because they were "not made void by explicit provision" and "not incestuous"). Ohio law declares same-sex marriage contrary to the State's public policy, placing those marriages within the longstanding exception to Ohio's recognition rule. *See* Ohio Rev. Code § 3101.01(C).

IV.

That leaves one more claim, premised on the constitutional right to travel. In the Tennessee case (*Tanco*) and one of the Ohio cases (*Henry*), the claimants maintain that a State's refusal to recognize out-of-state same-sex marriages illegitimately burdens the right to travel—in the one case by penalizing couples who move into the State by refusing to recognize their marriages, in the other by preventing their child from obtaining a passport because the State refused to provide a birth certificate that included the names of both parents.

The United States Constitution does not mention a right to travel by name. "Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted). It provides three

guarantees: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien" when visiting a second State; and (3) the right of new permanent residents "to be treated like other citizens of that State." *Id.* at 500.

Tennessee's nonrecognition law does not violate these prohibitions. It does not ban, or for that matter regulate, movement into or out of the State other than in the respect all regulations create incentives or disincentives to live in one place or another. Most critically, the law does not punish out-of-state new residents in relation to its own born and bred. Nonresidents are "treated" just "like other citizens of that State," *id.*, because the State has not expanded the definition of marriage to include gay couples in all settings, whether the individuals just arrived in Tennessee or descend from Andrew Jackson.

The same is true for the Ohio law. No regulation of movement or differential treatment between the newly resident and the longstanding resident occurs. All Ohioans must follow the State's definition of marriage. With respect to the need to obtain an Ohio birth certificate before obtaining a passport, they can get one. The certificate just will not include both names of the couple. The "just" of course goes to the heart of the matter. In that respect, however, it is due process and equal protection, not the right to travel, that govern the issue.

* * *

This case ultimately presents *two* ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.

If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.

For these reasons, we reverse.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

> **"The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by."**
>
> Benjamin Cardozo, *The Nature of the Judicial Process* (1921)

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment. Instead, the majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for "proceeding with caution" (otherwise known as the "wait and see" approach), I dissent.

In the main, the majority treats both the issues and the litigants here as mere abstractions. Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win "the hearts and minds" of Michigan, Ohio, Kentucky, and Tennessee voters to their cause. But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples, many of them heading up *de facto* families, who want to achieve equal status—*de jure* status, if you will—with their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools. They seek to do this by virtue of exercising a civil right that most of us take for granted—the right to marry.[1]

Readers who are familiar with the Supreme Court's recent opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and its progeny in the circuit courts, particularly the Seventh Circuit's

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[1] See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

opinion in *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) ("Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, . . . they are about the welfare of American children."), must have said to themselves at various points in the majority opinion, "But what about the children?" I did, and I could not find the answer in the opinion. For although my colleagues in the majority pay lip service to marriage as an institution conceived for the purpose of providing a stable family unit "within which children may flourish," they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit.

Indeed, with the exception of Ohio, the defendants in each of these cases—the proponents of their respective "defense of marriage" amendments—spent virtually their entire oral arguments professing what has come to be known as the "irresponsible procreation" theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for "unintended offspring" by channeling their biological procreators into the bonds of matrimony. When we asked counsel why that goal required the simultaneous exclusion of same- sex couples from marrying, we were told that permitting same-sex marriage might denigrate the institution of marriage in the eyes of opposite-sex couples who conceive out of wedlock, causing subsequent abandonment of the unintended offspring by one or both biological parents. We also were informed that because same-sex couples cannot themselves produce wanted or unwanted

offspring, and because they must therefore look to non-biological means of parenting that require planning and expense, stability in a family unit headed by same-sex parents is assured without the benefit of formal matrimony. But, as the court in *Baskin* pointed out, many "abandoned children [born out of wedlock to biological parents] are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married." *Id.* How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be "channeled" into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry. As an obviously exasperated Judge Posner responded after puzzling over this same paradox in *Baskin*, "Go figure." *Id.* at 662.

In addressing the "irresponsible procreation" argument that has been referenced by virtually every state defendant in litigation similar to this case, the *Baskin* court noted that estimates put the number of American children being raised by same-sex parents at over 200,000. *Id.* at 663. "Unintentional offspring are the children most likely to be put up for adoption," *id.* at 662, and because statistics show that same-sex couples are many times more likely to adopt than opposite-sex couples, "same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters." *Id.* at 663. Moreover, "[i]f marriage is better for children who

are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents." *Id.* at 664.

The concern for the welfare of children that echoes throughout the *Baskin* opinion can be traced in part to the earlier opinion in *Windsor*, in which the Supreme Court struck down, as unconstitutional on equal-protection grounds, section 3 of the federal Defense of Marriage Act (DOMA), which defined the term "marriage" for federal purposes as "mean[ing] only a legal union between one man and one woman as husband and wife," and the term "spouse" as "refer[ring] only to a person of the opposite sex who is a husband or a wife." *Id.* at 2683 (citing 1 U.S.C. § 7). Although DOMA did not affect the prerogative of the states to regulate marriage within their respective jurisdictions, it did deprive same-sex couples whose marriages were considered valid under state law of myriad federal benefits. As Justice Kennedy, writing for the majority, pointed out:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency . . . . The differentiation demeans the [same- sex] couple, whose moral and sexual choices the Constitution protects, see *Lawrence* [*v. Texas*], 539 U.S. 558 [(2003)], and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being

> raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Id. at 2694.

Looking more closely at the situation of just one of the same-sex couples from the six cases before us brings Justice Kennedy's words on paper to life. Two of the Michigan plaintiffs, April DeBoer and Jayne Rowse, are unmarried, same-sex partners who have lived as a couple for eight years in a home they own together. They are both trained and employed as nurses, DeBoer in a hospital neonatal department and Rowse in an emergency department at another hospital. Together they are rearing three children but, due to existing provisions in Michigan's adoption laws, DeBoer and Rowse are prohibited from adopting the children as joint parents because they are unmarried. Instead, Rowse alone adopted two children, who are identified in the record as N and J. DeBoer adopted the third child, who is identified as R.

All three children had difficult starts in life, and two of them are now characterized as "special needs" children. N was born on January 25, 2009, to a biological mother who was homeless, had psychological impairments, was unable to care for N, and subsequently surrendered her legal rights to N. The plaintiffs volunteered to care for the boy and brought him into their home following his birth. In

November 2009, Rowse completed the necessary steps to adopt N legally.

Rowse also legally adopted J after the boy's foster care agency asked Rowse and DeBoer initially to serve as foster parents and legal guardians for him, despite the uphill climb the baby faced. According to the plaintiffs' amended complaint:

> J was born on November 9, 2009, at Hutzel Hospital, premature at 25 weeks, to a drug addicted prostitute. Upon birth, he weighed 1 pound, 9 ounces and tested positive for marijuana, cocaine, opiates and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital in the NICU for four months with myriad different health complications, and was not expected to live. If he survived, he was not expected to be able to walk, speak or function on a normal level in any capacity. . . . With Rowse and DeBoer's constant care and medical attention, many of J's physical conditions have resolved.

The third adopted child, R, was born on February 1, 2010, to a 19-year-old girl who received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where plaintiff DeBoer worked. R continues to experience issues related to her lack of prenatal care, including delayed gross motor skills. She is in a physical-therapy program to address these problems.

Both DeBoer and Rowse share in the responsibilities of raising the two four-year-olds and the five-year-old. The plaintiffs even have gone so far as to "coordinate their work schedules so that at least one parent is generally home with the children" to attend to their medical needs and perform other parental duties. Given the close-knit, loving environment shared by the plaintiffs and the children, DeBoer wishes to adopt N and J legally as a second parent, and Rowse wishes to adopt R legally as her second parent.

Although Michigan statutes allow married couples and single persons to adopt, those laws preclude unmarried couples from adopting each other's children. As a result, DeBoer and Rowse filed suit in federal district court challenging the Michigan adoption statute, Michigan Compiled Laws § 710.24, on federal equal-protection grounds. They later amended their complaint to include a challenge to the so-called Michigan Marriage Amendment, *see* Mich. Const. art. I, § 25, added to the Michigan state constitution in 2004, after the district court suggested that the plaintiffs' "injury was not traceable to the defendants' enforcement of section [710.24]" but, rather, flowed from the fact that the plaintiffs "were not married, and any legal form of same-sex union is prohibited" in Michigan. The case went to trial on the narrow legal issue of whether the amendment could survive rational basis review, *i.e.*, whether it proscribes conduct in a manner that is rationally related to any conceivable legitimate governmental purpose.

The bench trial lasted for eight days and consisted of testimony from sociologists, economists,

law professors, a psychologist, a historian, a demographer, and a county clerk. Included in the plaintiffs' presentation of evidence were statistics regarding the number of children in foster care or awaiting adoption, as well as testimony regarding the difficulties facing same-sex partners attempting to retain parental influence over children adopted in Michigan. Gary Gates, a demographer, and Vivek Sankaran, the director of both the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School, together offered testimony painting a grim picture of the plight of foster children and orphans in the state of Michigan. For example, Sankaran noted that just under 14,000 foster children reside in Michigan, with approximately 3,500 of those being legal orphans. Nevertheless, same-sex couples in the state are not permitted to adopt such children as a couple. Even though one person can legally adopt a child, should anything happen to that adoptive parent, there is no provision in Michigan's legal framework that would "ensure that the children would necessarily remain with the surviving non-legal parent," even if that parent went through the arduous, time-consuming, expensive adoption-approval process. Thus, although the State of Michigan would save money by moving children from foster care or state care into adoptive families, and although same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adopted child and twice as likely to be fostering a child, there remains a legal disincentive for same-sex couples to adopt children there.

David Brodzinsky, a developmental and clinical psychologist, for many years on the faculty at Rutgers University, reiterated the testimony that Michigan's ban on adoptions by same-sex couples increases the potential risks to children awaiting adoptions. The remainder of his testimony was devoted to a systematic, statistic-based debunking of studies intimating that children raised in gay or lesbian families, *ipso facto*, are less well-adjusted than children raised by heterosexual couples. Brodzinsky conceded that marriage brings societal legitimatization and stability to children but noted that he found no statistically significant differences in general characteristics or in development between children raised in same-sex households and children raised in opposite-sex households, and that the psychological well-being, educational development, and peer relationships were the same in children raised in gay, lesbian, or heterosexual homes.

Such findings led Brodzinsky to conclude that the gender of a parent is far less important than the quality of the parenting offered and that family processes and resources are far better predictors of child adjustment than the family structure. He testified that those studies presuming to show that children raised in gay and lesbian families exhibited more adjustment problems and decreased educational achievement were seriously flawed, simply because they relied on statistics concerning children who had come from families experiencing a prior traumatic breakup of a failed heterosexual relationship. In fact, when focusing upon children of

lesbian families created through donor insemination, Brodzinsky found no differences in comparison with children from donor insemination in heterosexual families or in comparison with children conceived naturally in heterosexual families. According to Brodzinsky, such a finding was not surprising given the fact that all such children experienced no family disruption in their past. For the same reason, few differences were noted in studies of children adopted at a very early age by same-sex couples and children naturally born into heterosexual families.

Nancy Cott, a professor of history at Harvard University, the director of graduate studies there, and the author of *Public Vows: A History of Marriage and the Nation,* also testified on behalf of the plaintiffs. She explained how the concept of marriage and the roles of the marriage partners have changed over time. As summarized by Cott, the wife's identity is no longer subsumed into that of her husband, interracial marriages are legal now that the antiquated, racist concept of preserving the purity of the white race has fallen into its rightful place of dishonor, and traditional gender-assigned roles are no longer standard. Cott also testified that solemnizing marriages between same-sex partners would create tangible benefits for Michigan citizens because spouses would then be allowed to inherit without taxation and would be able to receive retirement, Social Security, and veteran's benefits upon the death of an eligible spouse. Moreover, statistics make clear that heterosexual marriages have not suffered or decreased in number as a result of states permitting same-sex marriages. In fact, to the contrary, Cott noted that there exists some evidence that many young people now refuse

to enter into heterosexual marriages until their gay or lesbian friends can also enjoy the legitimacy of state-backed marriages.

Michael Rosenfeld, a Stanford University sociologist, testified about studies he had undertaken that confirmed the hypothesis that legitimation of same-sex relationships promotes their stability. Specifically, Rosenfeld's research established that although same-sex couples living in states without recognition of their commitments to each other did have a higher break- up rate than heterosexual married couples, the break-up rates of opposite-sex married couples and same-sex couples in recognized civil unions were virtually identical. Similarly, the break-up rates of same-sex couples not living in a state-recognized relationship approximated the break-up rate of heterosexual couples cohabiting without marriage.

Rosenfeld also criticized the methodology of studies advanced by the defendants that disagreed with his conclusions. According to Rosenfeld, those critical studies failed to take into account the stability or lack of stability of the various groups examined. For example, he testified that one such study compared children who had experienced no adverse family transitions with children who had lived through many such traumatic family changes. Not surprisingly, children from broken homes with lower-income-earning parents who had less education and lived in urban areas performed more poorly in school than other children. According to Rosenfeld, arguments to the contrary that failed to control for such differences, taken to their extreme, would lead to the conclusion that only high-

income individuals of Asian descent who earned advanced degrees and lived in suburban areas should be allowed to marry.

To counteract the testimony offered by the plaintiffs' witnesses, the defendants presented as witnesses the authors or co-authors of three studies that disagreed with the conclusions reached by the plaintiffs' experts. All three studies, however, were given little credence by the district court because of inherent flaws in the methods used or the intent of the authors. For example, the New Family Structures Study reported by Mark Regnerus, a sociologist at the University of Texas at Austin, admittedly relied upon interviews of children from gay or lesbian families who were products of broken heterosexual unions in order to support a conclusion that living with such gay or lesbian families adversely affected the development of the children. Regnerus conceded, moreover, that his own department took the highly unusual step of issuing the following statement on the university website in response to the release of the study:

> [Dr. Regnerus's opinions] do not reflect the views of the sociology department of the University of Texas at Austin. Nor do they reflect the views of the American Sociological Association which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that the findings from Dr. Regnerus'[s] work have been cited inappropriately in

> efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

In fact, the record before the district court reflected clearly that Regnerus's study had been funded by the Witherspoon Institute, a conservative "think tank" opposed to same-sex marriage, in order to vindicate "the traditional understanding of marriage."

Douglas Allen, the co-author of another study with Catherine Pakaluk and Joe Price, testified that children raised by same-sex couples graduated from high school at a significantly lower rate than did children raised by heterosexual married couples. On cross-examination, however, Allen conceded that "many of those children who . . . were living in same-sex households had previously lived in an opposite sex household where their parents had divorced, broken up, some kind of separation or transition." Furthermore, Allen provided evidence of the bias inherent in his study by admitting that he believed that engaging in homosexual acts "means eternal separation from God, in other words[,] going to hell."

The final study advanced by the defendants was conducted by Loren Marks, a professor in human ecology at Louisiana State University, in what was admittedly an effort to counteract the "groupthink" portrayed by perceived "liberal psychologists." But although Marks criticized what he perceived to be "a pronounced liberal lean on social issues" by many psychologists, he revealed his own bias by acknowledging that he was a lay clergyman in the Church of Jesus Christ of Latter

Day Saints (LDS) and that the LDS directive "for a couple to be married by God's authority in God's house, the holy temple, and then to have children per the teaching that God's commandment for his children to multiply and replenish the earth remains in force."

Presented with the admitted biases and methodological shortcomings prevalent in the studies performed by the defendant's experts, the district court found those witnesses "largely unbelievable" and not credible. *DeBoer v. Snyder*, 973 F. Supp.2d 757, 768 (E.D. Mich. 2014). Proceeding to a legal analysis of the core issue in the litigation, the district court then concluded that the proscriptions of the marriage amendment are not rationally related to any legitimate state interest. Addressing the defendants' three asserted rational bases for the amendment,[2]the district court found each such proffered justification without merit.

Principally, the court determined that the amendment is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing. The testimony adduced at trial clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children. Indeed, marriage, whether between same- sex or opposite-

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[2] In the district court, the state did not advance an "unintended pregnancy" argument, nor was that claim included in the state's brief on appeal, although counsel did mention it during oral argument. In terms of "optimal environment," the state emphasized the need for children to have "both a mom and a dad," because "men and women are different," and to have a "biological connection to their parents."

sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents. Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

Furthermore, the district court found no reason to believe that the amendment furthers the asserted state interests in "proceeding with caution" before "altering the traditional definition of marriage" or in "upholding tradition and morality." As recognized by the district court, there is no legitimate justification for delay when constitutional rights are at issue, and even adherence to religious views or tradition cannot serve to strip citizens of their right to the guarantee of equal protection under the law.

Finally, and relatedly, the district court acknowledged that the regulation of marriage traditionally has been seen as part of a state's police power but concluded that this fact cannot serve as an excuse to ignore the constitutional rights of individual citizens. Were it otherwise, the court observed, the prohibition in Virginia and in many other states against miscegenation still would be in effect today. Because the district court found that "regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail," the court held the

amendment and its implementing statutes "unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 775.

If I were in the majority here, I would have no difficulty in affirming the district court's opinion in *DeBoer*. The record is rich with evidence that, as a pragmatic matter, completely refutes the state's effort to defend the ban against same-sex marriage that is inherent in the marriage amendment. Moreover, the district court did a masterful job of supporting its legal conclusions. Upholding the decision would also control the resolution of the other five cases that were consolidated for purposes of this appeal.

Is a thorough explication of the legal basis for such a result appropriate? It is, of course. Is it necessary? In my judgment, it is not, given the excellent—even eloquent—opinion in *DeBoer* and in the opinions that have come from four other circuits in the last few months that have addressed the same issues involved here: *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (holding Utah statutes and state constitutional amendment banning same-sex marriage unconstitutional under the Fourteenth Amendment); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (same, Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta v. Otter*, Nos. 14-35420, 14-35421, 12- 17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014)

(same, Idaho and Nevada statutes and state constitutional amendments.[3]

Kitchen was decided primarily on the basis of substantive due process, based on the Tenth Circuit's determination that under Supreme Court precedents, the right to marry includes the right to marry the person of one's choice. The court located the source of that right in Supreme Court opinions such as *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (recognizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home and bring up children"); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki*, 434 U.S. at 384 (recognizing that "the right to marry is of fundamental importance for all individuals"); and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (in the context of a prison inmate's right to marry, "[such] marriages are expressions of emotional support and public commitment[,] . . . elements [that] are important and significant aspects of the marital relationship" even in situations in which procreation is not possible). *Kitchen*, 755 F.3d at 1209-11. The

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[3] On October 6, the Supreme Court denied certiorari and lifted stays in *Kitchen*, *Bostic*, and *Baskin*, putting into effect the district court injunctions entered in each of those three cases. A stay of the mandate in the Idaho case in *Latta* also has been vacated, and the appeal in the Nevada case is not being pursued. As a result, marriage licenses are currently being issued to same-sex couples throughout most—if not all—of the Fourth, Seventh, Ninth, and Tenth Circuits.

Tenth Circuit also found that the Utah laws violated equal protection, applying strict scrutiny because the classification in question impinged on a fundamental right. In doing so, the court rejected the state's reliance on various justifications offered to establish a compelling state interest in denying marriage to same-sex couples, finding "an insufficient causal connection" between the prohibition on same-sex marriage and the state's "articulated goals," which included a purported interest in fostering biological reproduction, encouraging optimal childrearing, and maintaining gendered parenting styles. *Id.* at 1222. The court also rejected the state's prediction that legalizing same-sex marriage would result in social discord, citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting "community confusion and turmoil" as a reason to delay desegregation of public parks). *Id.* at 1227.

The Fourth Circuit in *Bostic* also applied strict scrutiny to strike down Virginia's same- sex-marriage prohibitions as infringing on a fundamental right, citing *Loving* and observing that "[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." 760 F.3d at 376. In a thoughtful opinion, the court analyzed each of the state's proffered interests: maintaining control of the "definition of marriage," adhering to the "tradition of opposite-sex marriage," "protecting the institution of marriage," "encouraging responsible procreation," and "promoting the optimal childrearing environment." *Id.* at 378. In each instance, the court found that there was no link between the state's purported "compelling interest" and the exclusion of

same-sex couples "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id.* at 384. As to the state's interest in federalism, the court pointed to the long-recognized principle that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons," *id.* at 379 (quoting *Windsor*, 133 S. Ct. at 2691), and highlighted *Windsor*'s reiteration of "*Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Id.* Addressing the state's contention that marriage under state law should be confined to opposite-sex couples because unintended pregnancies cannot result from same-sex unions, the court noted that "[b]ecause same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently." *Id.* at 381-82 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

The Seventh Circuit's *Baskin* opinion is firmly grounded in equal-protection analysis. The court proceeded from the premise that "[d]iscrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect." 766 F.3d at 654. But the court also found that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not

subjected to heightened scrutiny." *Id.* at 656. This conclusion was based on the court's rejection of "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended," an argument "so full of holes that it cannot be taken seriously." *Id.* (emphasis in original). The court therefore found it unnecessary to engage in "the more complex analysis found in more closely balanced equal-protection cases" or under the due process clause of the Fourteenth Amendment." *Id.* at 656-57.

The Ninth Circuit's opinion in *Latta* also focuses on equal-protection principles in finding that Idaho's and Nevada's statutes and constitutional amendments prohibiting same-sex marriage violate the Fourteenth Amendment. Because the Ninth Circuit had recently held in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), that classifications based on sexual orientation are subject to heightened scrutiny, a conclusion the court drew from its reading of *Windsor* to require assessment more rigorous than rational-basis review, the path to finding an equal-protection violation was less than arduous. As did the Tenth Circuit in *Kitchen*, the court in *Latta* found it "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices with regard to procreation. *Latta*, 2014 WL 4977682, *5 (citing *Kitchen*, 755 F.3d at 1223).

These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth

Circuit cases as a basis for excluding same-sex couples from contracting valid marriages. Indeed, it would seem unnecessary for this court to do more than cite those cases in affirming the district courts' decisions in the six cases now before us. Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same- sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens. Perhaps that is the case, but it does not relieve the dissenting member of the panel from the obligation of a rejoinder.

Baker v. Nelson

If ever there was a legal "dead letter" emanating from the Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), is a prime candidate. It lacks only a stake through its heart. Nevertheless, the majority posits that we are bound by the Court's aging one-line order denying review of an appeal from the Minnesota Supreme Court "for want of a substantial federal question." As the majority notes, the question concerned the state's refusal to issue a marriage license to a same-sex couple, but the decision came at a point in time when sodomy was legal in only one state in the country, Illinois, which had repealed its anti-sodomy statute in 1962. The Minnesota statute criminalizing same-sex intimate relations was not struck down until

2001, almost 30 years after *Baker* was announced.[4] The Minnesota Supreme Court's denial of relief to a same-sex couple in 1971 and the United States Supreme Court's conclusion that there was no *substantial* federal question involved in the appeal thus is unsurprising. As the majority notes— not facetiously, one hopes—"that was then; this is now."

At the same time, the majority argues that we are bound by the eleven words in the order, despite the Supreme Court silence on the matter in the 42 years since it was issued. There was no recognition of *Baker* in *Romer v. Evans*, 517 U.S. 620 (1996), nor in *Lawrence v. Texas*, 539 U.S. 558 (2003), and not in *Windsor*, despite the fact that the dissenting judge in the Second Circuit's opinion in *Windsor* made the same argument that the majority makes in this case. *See Windsor v. United States*, 699 F.3d 169, 189, 192-95 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part). And although the argument was vigorously pressed by the DOMA proponents in their Supreme Court brief in *Windsor*,[5] neither Justice Kennedy in his opinion for the court nor any of the four dissenting judges in their three separate opinions mentioned *Baker*. In addition, the order was not cited in the three orders of October 6, 2014, denying *certiorari* in *Kitchen*, *Bostic*, and *Baskin*. If this string of cases—*Romer*,

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[4] *See Doe v. Ventura*, No. 01-489, 2001 WL 543734 (D. Ct. of Hennepin Cnty. May 15, 2001) (unreported).

[5] *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, No. 12-307, 2013 WL 267026 at 16-19, 25-26 (Jan. 22, 2013).

Lawrence, *Windsor*, *Kitchen*, *Bostic*, and *Baskin*—does not represent the Court's overruling of *Baker sub silentio*, it certainly creates the "doctrinal development" that frees the lower courts from the strictures of a summary disposition by the Supreme Court. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted).

Definition of Marriage

The majority's "original meaning" analysis strings together a number of case citations but can tell us little about the Fourteenth Amendment, except to assure us that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage." The quick answer is that they undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967. Despite a civil war, the end of slavery, and ratification of the Fourteenth Amendment in 1868, extensive litigation has been necessary to achieve even a modicum of constitutional protection from discrimination based on race, and it has occurred primarily by judicial decree, not by the democratic election process to which the majority suggests we should defer regarding discrimination based on sexual orientation.

Moreover, the majority's view of marriage as "a social institution defined by relationships between men and women" is wisely described in the plural. There is not now and never has been a

universally accepted definition of marriage. In early Judeo-Christian law and throughout the West in the Middle Ages, marriage was a religious obligation, not a civil status. Historically, it has been pursued primarily as a political or economic arrangement. Even today, polygynous marriages outnumber monogamous ones—the practice is widespread in Africa, Asia, and the Middle East, especially in countries following Islamic law, which also recognizes temporary marriages in some parts of the world. In Asia and the Middle East, many marriages are still arranged and some are even coerced.

Although some of the older statutes regarding marriage cited by the majority do speak of the union of "a man and a woman," the picture hardly ends there. When Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view," *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting), he may have been unfamiliar with all that the "traditional view" entailed, especially for women who were subjected to coverture as a result of Anglo-American common law. Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that "invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage." *Latta*, 2014 WL 4977682, at *20 (Berzon, J., concurring).

> Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights

and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife . . . one person," such that "the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts . . . binding on her or him." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of

marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows*, at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property . . . ." *Frontiero*, 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.*, Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 79 (3d ed. 2012). Quite literally, a wife was legally "the possession of her husband, . . . [her] husband's property." Hartog, *Man and Wife in America*, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was

the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.*, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.*, Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence. . . does not mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape

his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that "'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.'" *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n.9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 33 (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of

> the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Id. at *20-21.

Women were not the only class deprived of equal status in "traditional marriage." Until the end of the Civil War in 1865, slaves were prohibited from contracting legal marriages and often resorted to "jumping the broomstick" to mark a monogamous conjugal relationship. Informal "slave marriage" was the rule until the end of the war, when Freedmen's Bureaus began issuing marriage licenses to former slaves who could establish the existence of long-standing family relationships, despite the fact that family members were sometimes at great distances from one another. The ritual of jumping the broomstick, thought of in this country in terms of slave marriages, actually originated in England, where civil marriages were not available until enactment of the Marriage Act of 1837. Prior to that, the performance of valid marriages was the sole prerogative of the Church of England, unless the participants were Quakers or Jews. The majority's admiration for "traditional marriage" thus seems misplaced, if not naïve. The legal status has been through so many reforms that the marriage of same-sex couples constitutes merely the latest wave in a vast sea of change.

Rational-Basis Review.

The principal thrust of the majority's rational-basis analysis is basically a reiteration of the same tired argument that the proponents of same-sex-marriage bans have raised in litigation across the country: marriage is about the regulation of "procreative urges" of men and women who therefore do not need the "government's encouragement to have sex" but, instead, need encouragement to "create and maintain stable relationships within which children may flourish." The majority contends that exclusion of same-sex couples from marriage must be considered rational based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended children." As previously noted, however, this argument is one that an eminent jurist has described as being "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656 (Posner, J.).

At least my colleagues are perceptive enough to acknowledge that "[g]ay couples, no less than straight couples, are capable of sharing such relationships . . . [and] are capable of raising stable families." The majority is even persuaded that the "quality of [same-sex] relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." All of which, the majority surmises, "supports the policy argument made by many that marriage laws should be extended to gay couples." But this conclusion begs the question: why reverse the judgments of four federal district courts, in four

different states, and in six different cases that would do just that?

There are apparently two answers; first, "let the people decide" and, second, "give it time." The majority posits that "just as [same-sex marriage has been adopted in] nineteen states and the District of Columbia," the change-agents in the Sixth Circuit should be "elected legislators, not life-tenured judges." Of course, this argument fails to acknowledge the impracticalities involved in amending, re-amending, or un-amending a state constitution.[6] More to the point, under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite. As the Supreme Court has noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal

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[6] In Tennessee, for example, a proposed amendment must first be approved by a simple majority of both houses. In the succeeding legislative session, which can occur as long as a year or more later, the same proposed amendment must then be approved "by two-thirds of all the members elected to each house." Tenn. Const. art. XI,§ 3. The proposed amendment is then presented "to the people at the next general election in which a Governor is to be chosen," *id.*, which can occur as long as three years or more later. If a majority of all citizens voting in the gubernatorial election also approve of the proposed amendment, it is considered ratified. The procedure for amending the constitution by convention can take equally long and is, if anything, more complicated. In Michigan, a constitutional convention, one of three methods of amendment, can be called no more often than every 16 years. *See* Mich. Const. art. XII, § 3.

Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448 (internal citation omitted).

Moreover, as it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions, both state and federal: Massachusetts, Connecticut, Iowa, New Mexico, and Colorado (state supreme court decisions); New Jersey (state superior court decision not appealed by defendant); California (federal district court decision allowed to stand in ruling by United States Supreme Court); and Oregon and Pennsylvania (federal district court decisions not appealed by defendants). Despite the majority's insistence that, as life-tenured judges, we should step aside and let the voters determine the future of the state constitutional provisions at issue here, those nine federal and state courts have seen no acceptable reason to do so. In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* review in *Kitchen*, *Bostick*, and *Baskin*, and the Court's order dissolving the stay in *Latta*. The result has been the issuance of hundreds—perhaps thousands—of marriage licenses in the wake of those orders. Moreover, the 35 states that are now positioned to recognize same- sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court

decided *Loving*. If the majority in this case is waiting for a tipping point, it seems to have arrived.

The second contention is that we should "wait and see" what the fallout is in the states where same-sex marriage is now legal. The majority points primarily to Massachusetts, where same-sex couples have had the benefit of marriage for "only" ten years—not enough time, the majority insists, to know what the effect on society will be. But in the absence of hard evidence that the sky has actually fallen in, the "states as laboratories of democracy" metaphor and its pitch for restraint has little or no resonance in the fast-changing scene with regard to same-sex marriage. Yet, whenever the expansion of a constitutional right is proposed, "proceed with caution" seems to be the universal mantra of the opponents. The same argument was made by the State of Virginia in *Loving*. And, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the government asked the Court to postpone applying heightened scrutiny to allegations of gender discrimination in a statute denying equal benefits to women until the Equal Rights Amendment could be ratified. If the Court had listened to the argument, we would, of course, still be waiting. One is reminded of the admonition in Martin Luther King, Jr.'s "Letter from Birmingham Jail" (1963): "For years now I have heard the word "Wait"! . . . [But h]uman progress never rolls in on wheels of inevitability . . . [and] time itself becomes an ally of the forces of social stagnation."

Animus

Finally, there is a need to address briefly the subject of unconstitutional animus, which the majority opinion equates only with actual malice and hostility on the part of members of the electorate. But in many instances involving rational-basis review, the Supreme Court has taken a more objective approach to the classification at issue, rather than a subjective one. Under such an analysis, it is not necessary for a court to divine individual malicious intent in order to find unconstitutional animus. Instead, the Supreme Court has instructed that an exclusionary law violates the Equal Protection Clause when it is based not upon relevant facts, but instead upon only a general, ephemeral distrust of, or discomfort with, a particular group, for example, when legislation is justified by the bare desire to exclude an unpopular group from a social institution or arrangement. In *City of Cleburne*, for example, the Court struck down a zoning regulation that was justified simply by the "negative attitude" of property owners in the community toward individuals with intellectual disabilities, not necessarily by actual malice toward an unpopular minority. In doing so, the Court held that "the City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic," 473 U.S. at 448, and cited *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In any event, as the majority here concedes, we as a country have such a long history of prejudice based on sexual orientation that it seems hypocritical to

deny the existence of unconstitutional animus in the rational-basis analysis of the cases before us.

To my mind, the soundest description of this analysis is found in Justice Stevens's separate opinion in *City of Cleburne*:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

Id. at 453 (Stevens, J., concurring) (footnotes omitted). I would apply just this analysis to the constitutional amendments and statutes at issue in these cases, confident that the result of the inquiry would be to affirm the district courts' decisions in all six cases. I therefore dissent from the majority's decision to overturn those judgments.

Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and

necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." *See* 28 U.S.C. § 453. If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO (W.D.)

BRITTANI HENRY, *et al.*, Case No. 1:14-cv-129
Plaintiffs, Judge Timothy S. Black

vs. :

LANCE HIMES, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

On December 23, 2013, this Court ruled in no uncertain terms that:

> "Article 15, Section 11, of the Ohio Constitution, and Ohio Revised Code Section 3101.01(C) [Ohio's "marriage recognition bans"], violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio, are denied their fundamental right to marriage recognition without due process of law; and are denied their fundamental right to equal protection of the laws when Ohio does recognize comparable heterosexual marriages from other

> jurisdictions, even if obtained to circumvent Ohio law."

Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 997 (S.D. Ohio 2013).

The *Obergefell* ruling was constrained by the limited relief requested by the Plaintiffs in that case, but the analysis was nevertheless universal and unmitigated, and it directly compels the Court's conclusion today. The record before the Court, which includes the judicially-noticed record in *Obergefell*, is staggeringly devoid of any legitimate justification for the State's ongoing arbitrary discrimination on the basis of sexual orientation, and, therefore, **Ohio's marriage recognition bans are facially unconstitutional and unenforceable under any circumstances**.[1]

It is this Court's responsibility to give meaning and effect to the guarantees of the federal constitution for all American citizens, and that responsibility is never more pressing than when the fundamental rights of some minority of citizens are impacted by the legislative power of the majority. As the Supreme Court explained over 70 years ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish

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[1] The Court's Order today does NOT require Ohio to authorize the performance of same-sex marriage in Ohio. Today's ruling merely requires Ohio to recognize valid same-sex marriages lawfully performed in states which do authorize such marriages.

> them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other **fundamental rights may not be submitted to vote; they depend on the outcome of no elections**.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis supplied). This principle is embodied by the Court's decision today and by the **ten out of ten federal rulings since the Supreme Court's holding in *United States v. Windsor* — all declaring unconstitutional and enjoining similar bans in states across the country**.[2] The pressing and clear nature of the

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[2] *See, e.g.*, *Kitchen v. Herbert*, 2013 WL 6697874, at *30 (D. Utah Dec. 20, 2013) (permanently enjoining **Utah** anti-celebration provisions on due process and equal protection grounds); *Obergefell*, 962 F. Supp.2d at 997-98 (permanently enjoining as to plaintiffs enforcement of **Ohio** anti-recognition provisions on due process and equal protection grounds); *Bishop v. United States ex rel. Holder*, 2014 WL 116013, at *33-34 (N.D. Okla. Jan. 14, 2014) (permanently enjoining **Oklahoma's** anti-celebration provisions on equal protection grounds); *Bourke v. Beshear*, 2014 WL 556729, at *1 (W.D. Ky. Feb. 12, 2014) (declaring **Kentucky's** anti-recognition provisions unconstitutional on equal protection grounds); *Bostic v. Rainey*, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014) (finding **Virginia's** anti-celebration and anti-recognition laws unconstitutional on due process and equal protection grounds, and preliminarily enjoining enforcement); *Lee v. Orr*, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (declaring **Illinois** celebration ban unconstitutional on equal protection grounds); *De Leon v. Perry*, 2014 WL 715741, at *1, 24 (W.D. Tex. Feb. 26, 2014) (preliminarily enjoining **Texas** anti-celebration and anti-recognition provisions on equal protection and due process

ongoing constitutional violations embodied by these kinds of state laws is evidenced by the fact the Attorney General of the United States and eight state attorneys general have refused to defend provisions similar to Ohio's marriage recognition bans. (Doc. 25 at 2).

This civil action is now before the Court on Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 18) and the parties' responsive memoranda. (Docs. 20 and 25). Plaintiffs include four same-sex couples married in jurisdictions that provide for such marriages, including three female couples who are expecting children conceived via anonymous donors within the next few months and one male couple with an Ohio-born adopted son. All four couples are seeking to have the names of both parents recorded on their children's Ohio birth certificates. More specifically, Plaintiffs seek a declaration that Ohio's refusal to recognize valid same-sex marriages is unconstitutional, a permanent injunction prohibiting Defendants and their officers and agents from enforcing those bans or denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions, and the issuance of birth certificates for the Plaintiffs' children listing both same-sex parents. (Doc. 18 at 1-2).

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grounds); *Tanco v. Haslam*, 2014 WL 997525, at *6, 9 (M.D. Tenn. Mar. 14, 2014) (enjoining enforcement of **Tennessee** anti-recognition provisions on equal protection grounds); *DeBoer v. Snyder*, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014) (permanently enjoining **Michigan** anti-celebration provisions on equal protection grounds); *Baskin v. Bogan* (S.D. Ind. April 10, 2014 (J. Young) (temporarily enjoining **Indiana**'s marriage recognition ban).

I. ESTABLISHED FACTS

A. Marriage Law in Ohio[3]

The general rule in the United States for interstate marriage recognition is the "place of celebration rule," or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere. Historically, Ohio has recognized marriages that would be invalid if performed in Ohio, but are valid in the jurisdiction where celebrated. This is true even when such marriages clearly violate Ohio law and are entered into outside of Ohio with the purpose of evading Ohio law with respect to marriage. Ohio departed from this tradition in 2004 to adopt its marriage recognition ban. Prior to 2004, the Ohio legislature had never passed a law denying recognition to a specific type of marriage solemnized outside of the state.

Ohio Revised Code Section 3101 was amended in 2004 to prohibit same-sex marriages in the state and to prohibit recognition of same-sex marriages from other states. Sub-section (C) provides the following:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

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[3] *See Obergefell*, 962 F. Supp. 2d at 974-75.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio . . .

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Ohio Rev. Code Ann. § 3101.01.

> Also adopted in 2004 was an amendment to the Ohio Constitution, which states:
>
> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const. art. XV, § 11.

B. Plaintiffs

1. Henry/Rogers Family[4]

Plaintiffs Brittani Henry and Brittni Rogers met in 2008. They have been in a loving, committed same-sex relationship since that time. On January 17, 2014, they were validly married in the state of New York, which state legally recognizes their marriage. Having established a home together and enjoying the support of their families, the couple decided they wanted to have children. Henry became pregnant through artificial insemination ("AI"), and she is due to deliver a baby boy in June 2014. The sperm donor is anonymous. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as their son's parent on his birth certificate.

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[4] *See* Doc. 4-2.

2. Yorksmith Family[5]

Nicole and Pam Yorksmith met and fell in love in 2006. They were married on October 14, 2008 in California, which state legally recognizes their marriage. The Yorksmith family already includes a three-year-old son born in Cincinnati in 2010. He was conceived through AI using an anonymous sperm donor. Nicole is their son's birth mother, but Pam was fully engaged in the AI process, pregnancy, and birth. They share the ongoing role as parents. However, only Nicole is listed on their son's birth certificate because Defendants will not list the names of both same-sex married parents on the birth certificates of their children conceived through AI.

Failing to have both parents listed on their son's birth certificate has caused the Yorksmith Family great concern. They have created documents attempting to ensure that Pam will be recognized with authority to approve medical care, deal with childcare workers and teachers, travel alone with their son, and otherwise address all the issues parents must resolve. Nicole and Pam allege that Defendants' denial of recognition of Pam's role as parent to their child is degrading and humiliating for the family.

Now Nicole is pregnant with their second child. She expects to give birth in June in Cincinnati. Nicole and Pam are married and will continue to be a married couple when their second child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the California marriage and both married spouses on the

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[5] *See* Doc. 4-3.

birth certificate of the Yorksmiths' baby boy. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as their son's parent on his birth certificate.

3. Noe/McCracken Family[6]

Plaintiffs Kelly Noe and Kelly McCracken have been in a loving, committed same-sex relationship since 2009. From the beginning of their time together, they agreed that they would have children. They were married in 2011 in the state of Massachusetts, which legally recognizes their marriage. Noe became pregnant through AI using an anonymous sperm donor. She expects to deliver a baby in a Cincinnati hospital in June 2014. McCracken consented to and was a full participant in the decision to build their family using AI. Noe and McCracken are married now and will continue to be a married couple when their child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the Massachusetts marriage and the marital presumption of parentage that should apply to this family for purposes of naming both parents on the baby's birth certificate. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as a parent on the baby's birth certificate when the child is born.

4. Vitale/Talmas Family[7]

Plaintiffs Joseph J. Vitale and Robert Talmas met in 1997. They live in New York City, where they work as corporate executives. Vitale and Talmas

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[6] *See* Doc. 4-4.

[7] *See* Doc. 4-5.

married on September 20, 2011 in New York, which state legally recognizes their marriage. The couple commenced work with Plaintiff Adoption S.T.A.R. to start a family through adoption. Adopted Child Doe was born in Ohio in 2013 and custody was transferred to Plaintiff Adoption S.T.A.R. shortly after birth. Vitale and Talmas immediately assumed physical custody and welcomed their son into their home. On January 17, 2014, an Order of Adoption of Adopted Child Doe was duly issued by the Surrogate's Court of the State of New York, County of New York, naming both Vitale and Talmas as full legal parents of Adopted Child Doe.

Plaintiffs are applying to the Ohio Department of Health, Office of Vital Statistics, for an amended birth certificate listing Adopted Child Doe's adoptive name and naming Vitale and Talmas as his adoptive parents. Based on the experience of Plaintiff Adoption S.T.A.R. with other clients and their direct communications with Defendant Himes's staff at the Ohio Department of Health, Adopted Child Doe will be denied a birth certificate that lists both men as parents. On the other hand, heterosexual couples married in New York who secure an order of adoption from a New York court regarding a child born in Ohio have the child's adoptive name placed on his or her birth certificate along with the names of both spouses as the parents of the adoptive child as a matter of course.

Without action by this Court, Defendant Himes will allow only one of these Plaintiffs to be listed as the parent on the birth certificate of Adopted Child Doe. Vitale and Talmas object to being forced to choose which one of them to be recognized

as their son's parent and to allowing this vitally important document to misrepresent the status of their family. They do not wish to expose their son to the life-long risks and harms they allege are attendant to having only one of his parents listed on his birth certificate.

5. Adoption S.T.A.R.[8]

Plaintiffs allege that prior to Governor Kasich, Attorney General DeWine, and prior-Defendant Wymyslo taking office in January, 2011, the Ohio Department of Health provided same-sex married couples such as Plaintiffs Vitale and Talmas with birth certificates for their adopted children, consistent with those requested in the Complaint. (Doc. 1). Defendant Himes has changed that practice, and now denies married same-sex couples with out-of-state adoption decrees amended birth certificates for their Ohio-born children naming both adoptive parents. (*See* Docs. 4-6, 4-7, and 4-8).

As a result of Ohio's practice of not amending birth certificates for the adopted children of married same-sex parents, Plaintiff Adoption S.T.A.R. alleges it has been forced to change its placement agreements to inform potential same-sex adoptive parents that they will not be able to receive an accurate amended birth certificate for adopted children born in Ohio. Adoption S.T.A.R. alleges it has expended unbudgeted time and money to change its agreements and advise same-sex adoptive parents of Ohio's discriminatory practice. It alleges it has devoted extra time and money to cases like that of Plaintiffs Vitale and Talmas involving same-sex

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[8] *See* Doc. 4-6.

married couples who adopt children born in Ohio through court actions in other states. Adoption S.T.A.R. alleges that the process to seek an accurate birth certificate for Adopted Child Doe – including participation in this lawsuit – is expected to be a protracted effort that will cause the expenditure of extra time and money.

Adoption S.T.A.R. has served same-sex married couples in previous adoption cases and is currently serving other same-sex married couples in various stages of the adoption process in other states for children born in Ohio. Adoption S.T.A.R. alleges it will serve additional same-sex married couples in this capacity in the future. Adoption S.T.A.R. alleges that its clients' inability to secure amended birth certificates from Defendant Himes accurately listing both same-sex married persons as the legal parents of their adopted children imposes a significant burden on the agency's ability to provide adequate and equitable adoption services to its clients, results in incomplete adoptions and loss of revenue, and frustrates the very purpose of providing adoption services to its clients in the first place.

II. STANDARD OF REVIEW

Plaintiffs go beyond the as-applied challenge pursued in *Obergefell* and now seek a declaration that Ohio's marriage recognition ban is facially unconstitutional, invalid, and unenforceable. (Doc. 18 at 15). In other words, Plaintiffs allege that "no set of circumstances exists under which the [challenged marriage recognition ban] would be valid," and the ban should therefore be struck down in its entirety. *United States v. Salerno*, 481 U.S. 739, 745 (1987);

see also De Leon v. Perry, SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (declaring that Texas's ban on same-sex marriages and marriage recognition "fails the constitutional facial challenge because... Defendants have failed to provide any – and the Court finds no – rational basis that banning same-sex marriage furthers a legitimate governmental interest").

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir. 2012); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)); *Obergefell*, 962 F. Supp. 2d at 977. It lies within the sound discretion of the district court to grant or deny a motion for permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Obergefell*, 962 F. Supp. 2d at 977 (citing *Kallstrom*, 136 F.3d at 1067); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994).

The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. Fed. R. Civ. P. 57. In the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Savoie v. Martin*, 673 F.3d 488, 495-96 (6th Cir. 2012) (quoting

Grand Trunk W. R.R. Co. v. Consol. Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984)); *see also Obergefell*, 962 F. Supp. 2d at 977. Both circumstances arise here.

III. ANALYSIS

This Court has already held in *Obergefell* that Ohio's refusal to recognize the out-of-state marriages of same-sex couples violates the Fourteenth Amendment due process "right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections." 962 F. Supp. 2d at 978. In the birth certificate context, much like in the death certificate context, the marriage recognition ban denies same-sex married couples the "attendant benefits and protections" associated with state marriage recognition and documentation. This Court further held in *Obergefell* that the marriage recognition ban "violate[s] Plaintiffs' constitutional rights by denying them equal protection of the laws." *Id.* at 983. Finally, this Court declared the marriage recognition ban unconstitutional and unenforceable in the death certificate context.

The Court's analysis in *Obergefell* controls here, and compels not only the conclusion that the marriage recognition ban is unenforceable in the birth certificate context, but that it is facially unconstitutional and unenforceable in any context whatsoever.

A. Facial Challenge

Despite the limited relief pursued by the Plaintiffs in that case, this Court's conclusion in *Obergefell* clearly and intentionally expressed the facial invalidity of Ohio's marriage recognition ban,

not only as applied to the Plaintiffs and the issue of death certificates, but in any application to any married same-sex couple. 962 F. Supp. 2d at 997. Ohio's marriage recognition ban embodies an unequivocal, purposeful, and explicitly discriminatory classification, singling out same-sex couples alone, for disrespect of their out-of-state marriages and denial of their fundamental liberties. This classification, relegating lesbian and gay married couples to a second-class status in which *only their marriages* are deemed void in Ohio, is the core constitutional violation all of the Plaintiffs challenge.

The United States Constitution "neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (emphasis supplied). There can be no circumstance under which this discriminatory classification is constitutional, as it was intended to, and on its face does, stigmatize and disadvantage same-sex couples and their families, denying only to them protected rights to recognition of their marriages and violating the guarantee of equal protection. Indeed, this Court already held as much in *Obergefell*, finding that Ohio enacted the marriage recognition bans with discriminatory animus and without a single legitimate justification. 962 F. Supp. 2d at 995.

As noted, following the Supreme Court's ruling in *Windsor v. United States*, 133 S. Ct. 2675 (2013), a spate of federal courts from across the nation has issued rulings similar to *Obergefell*, holding that a state's ban on the right of same-sex couples to marry or to have their out-of-state marriages recognized violates the constitutional due process and equal

protection rights of these families. There is a growing national judicial consensus that state marriage laws treating heterosexual and same-sex couples differently violate the Fourteenth Amendment, and it is this Court's responsibility to act decisively to protect rights secured by the United States Constitution.

The Supreme Court explained in *Citizens United v. Federal Election Commission* that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." 558 U.S. 310, 331 (2010). The distinction between the two "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* Even in a case explicitly framed only as an as-applied challenge (which this case is not), the Court has authority to facially invalidate a challenged law. "'[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.'" *Id.* at 331 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000)).

It is therefore well within the Court's discretion to find the marriage ban facially unconstitutional and unenforceable in all circumstances on the record before it, and given the Court's extensive and comprehensive analysis in *Obergefell* pointing to the appropriateness of just such a conclusion, Defendants have been on notice of

the likely facial unconstitutionality of the marriage ban since before this case was ever filed.

B. Due Process Clause

The Due Process Clause of the Fourteenth Amendment establishes that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. § 1. The Due Process Clause protects "vital personal rights essential to the orderly pursuit of happiness by free men," more commonly referred to as "fundamental rights." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). There are a number of fundamental rights and/or liberty interests protected by the Due Process clause that are implicated by the marriage recognition ban, including the right to marry, the right to remain married,[9] and the right to parental autonomy.

1. Right to Marry

"The freedom to marry has long been recognized" as a fundamental right protected by the Due Process Clause. *Loving*, 388 U.S. at 12 (1967).[10]

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[9] The concept of the right to remain married as a liberty interest protected by the Due Process Clause is advanced by Professor Steve Sanders in his article *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2011).

[10] *See also Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.* at 495-496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family – a relation as old and as fundamental as our entire civilization"); *see generally*

Some courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry. *See, e.g., Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012).[11] However, neither the Sixth Circuit nor the Supreme Court have spoken on the issue, and this Court finds no reasonable basis on which to exclude gay men, lesbians, and others who wish to enter into same-sex marriages from this culturally foundational institution.

First, while states have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual. Accordingly, "**the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.**" *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (emphasis supplied); *see also Loving*, 388 U.S. at 12 ("Under our

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Washington v. Glucksberg, 521 U.S. 702, 727 n.19 (1997) (citing cases).

[11] *See also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306-07 (M.D. Fla. 2005) ("No federal court has recognized that [due process] . . . includes the right to marry a person of the same sex") (internal citation omitted); *Conaway v. Deane*, 932 A.2d 571, 628 (Md. App. 2007) ("[V]irtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole"); *Hernandez v. Robles*, 885 N.E.2d 1, 9 (N.Y. 2006) ("The right to marry is unquestionably a fundamental right . . . The right to marry someone of the same sex, however, is not "deeply rooted," it has not even been asserted until relatively recent times").

Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse ...").

The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage. In individual cases regarding parties to potential marriages with a wide variety of characteristics, the Court consistently describes a general "fundamental right to marry" rather than "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012) (citing *Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94-96; *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *accord In re Marriage Cases*, 183 P.3d 384, 421 n.33 (Cal. 2008) (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage'").

In *Lawrence v. Texas*, 549 U.S. 558 (2003), the Supreme Court held that the right of consenting adults (including same-sex couples) to engage in private, sexual intimacy is protected by the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws and their use against gay people. For the same reasons, the fundamental right to marry is "deeply rooted in this Nation's history and tradition" for

purposes of constitutional protection even though same-sex couples have not historically been allowed to exercise that right. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (citation omitted). While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right, once that right is recognized as one that due process protects.

"Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430 (quotation omitted). For example, when the Supreme Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of excluding interracial couples from marriage. *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* ..."); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be more skeptical of its rationality and cause for courts to be especially vigilant.

Cases subsequent to *Loving* have similarly confirmed that **the fundamental right to marry is available even to those who have not traditionally been eligible to exercise that right.** *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce, since doing so unduly burdened their fundamental right to marry again); *see also Zablocki*, 434 U.S. at 388-90 (state may not condition ability to marry on fulfillment of existing child support obligations). Similarly, the right to marry as traditionally understood in this country did not extend to people in prison. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). Nevertheless, in *Turner*, 482 U.S. at 95-97, the Supreme Court held that a state cannot restrict a prisoner's ability to marry without sufficient justification. When analyzing other fundamental rights and liberty interests in other contexts, the Supreme Court has consistently adhered to the principle that **a fundamental right**, once recognized, properly **belongs to everyone**.[12]

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[12] *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (an individual involuntarily committed to a custodial facility because of a disability retained liberty interests including a right to freedom from bodily restraint, thus departing from a longstanding historical tradition in which people with serious disabilities were not viewed as enjoying such substantive due process rights and were routinely subjected to bodily restraints in institutions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down a ban on distributing contraceptives to unmarried persons, building on a holding in *Griswold*, 381 U.S. at 486, that states could not prohibit the use of contraceptives by married persons); *Lawrence*, 539 U.S. at 566-67 (lesbian and

Consequently, based on the foregoing, the right to marriage is a fundamental right that is denied to same-sex couples in Ohio by the marriage recognition bans.

2. Right of Marriage Recognition

Defendants also violate the married Plaintiffs' right to remain married by enforcing the marriage bans, which right this Court has already identified as "a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution." *Obergefell*, 962 F. Supp. 2d at 978. "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Id.* at 979; *see also Windsor*, 133 S. Ct. at 2694 (When one jurisdiction refuses recognition of family relationships legally established in another, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects ... and whose relationship the State has sought to dignify"). **As the Supreme Court has held: this differential treatment "humiliates tens of thousands of children now being raised by same-sex couples,"** which group includes Adopted Child Doe and the children who will be born to the Henry/Rogers, Yorksmith, and Noe/McCracken families. *Windsor*, 133 S. Ct. at 2694.

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gay Americans could not be excluded from the existing fundamental right to sexual intimacy, even though historically they had often been prohibited from full enjoyment of that right).

3. Right to Parental Authority

Finally, the marriage recognition bans also implicate the parenting rights of same-sex married couples with children. The Constitution accords parents significant rights in the care and control of their children. *See Parham v. J.R.*, 442 U.S. 584, 602 (1979). Parents enjoy unique rights to make crucial decisions for their children, including decisions about schooling, religion, medical care, and with whom the child may have contact. *See, e.g., id.* (medical decisions); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (education and religion); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (education); *Troxel v.Granville*, 530 U.S. 57 (2000) (visitation with relatives). U.S. Supreme Court rulings, reflected in state laws, make clear that these parental rights are fundamental and may be curtailed only under exceptional circumstances. *See Troxel*, 530 U.S. at 66; *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *see also, e.g., In re D.A.*, 862 N.E.2d 829, 832 (Ohio 2007) (citing Ohio cases on parents' "paramount" right to custody of their children).

4. Level of Scrutiny

As a general matter, the Supreme Court applies strict scrutiny when a state law encroaches on a fundamental right, and thus such scrutiny is appropriate in the context of the right to marry and the right to parental authority. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973).

The right to marriage recognition has not been expressly recognized as "fundamental," however, and in the previously referenced set of cases establishing the highly-protected status of existing marriage,

family, and intimate relationships, the Supreme Court has often applied an intermediate standard of review falling in between rational basis and strict scrutiny. *See, e.g., Moore*, 431 U.S. at 113 (1977) (balancing the state interests advanced and the extent to which they are served by the challenged law against the burden on plaintiff's rights); *Zablocki*, 434 U.S. at 374 (same). As this Court held in *Obergefell*, "the balancing approach of intermediate scrutiny is appropriate in this similar instance where Ohio is intruding into – and in fact erasing – Plaintiffs' already-established marital and family relations." 962 F. Supp. 2d at 979.

5. Burden on Plaintiffs

When couples – including same-sex couples – enter into marriage, it generally involves long-term plans for how they will organize their finances, property, and family lives. "In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974). Married couples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it – including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage – will follow them.

When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction by refusing to recognize the marriage, that state unlawfully intrudes into the realm of private marital, family, and

intimate relations specifically protected by the Supreme Court. After *Lawrence*, same-sex relationships fall squarely within this sphere, and when it comes to same-sex couples, a state may not "seek to control a personal relationship," "define the meaning of the relationship," or "set its boundaries absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S at 578.

For example, when a parent's legal relationship to his or her child is terminated by the state, it must present clear and convincing evidence supporting its action to overcome the burden of its loss, *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982); and, here, a similar legal familial relationship is terminated by Ohio's marriage recognition ban. Moreover, the official statutory and constitutional establishment of same-sex couples married in other jurisdictions as a disfavored and disadvantaged subset of relationships has a destabilizing and stigmatizing impact on those relationships. In striking down the statutory provision that had denied gay and lesbian couples federal recognition of their otherwise valid marriages in *Windsor*, the Supreme Court observed:

> [The relevant statute] tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. **The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . And it humiliates tens of thousands of**

> **children now being raised by same-sex couples.** The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

133 S. Ct. at 2694 (emphasis supplied).

In the family law context, while opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. Ohio courts allow an individual gay or lesbian person to adopt a child, but not a same-sex couple. *Obergefell*, 962 F. Supp. 2d at 980. Same-sex couples are denied local and state tax benefits available to heterosexual married couples, denied access to entitlement programs (Medicaid, food stamps, welfare benefits, *etc.*) available to heterosexual married couples and their families, barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legally-recognized relationship status, denied the remedy of loss of consortium when a spouse is seriously injured through the acts of another, denied the remedy of a wrongful death claim when a spouse is fatally injured through the wrongful acts of another, and evicted from their homes following a spouse's death because same-sex spouses are considered complete strangers to each other in the eyes of the law. *Id.*

Identification on the child's birth certificate is the basic currency by which parents can freely exercise these protected parental rights and responsibilities. It is also the

only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts. **Obtaining a birth certificate that accurately identifies both parents of a child born using anonymous donor insemination or adopted by those parents is vitally important for multiple purposes.** The birth certificate can be critical to registering the child in school;[13] determining the parents' (and child's) right to make medical decisions at critical moments; obtaining a social security card for the child;[14] obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death;[15] claiming the child as a dependent on the parent's insurance plan; claiming the child as a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally.[16] **The**

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[13] *See* Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate generally must be presented at time of initial entry into public or nonpublic school.

[14] *See* Social Security Administration, Social Security Numbers for Children, http:// www.ssa.gov/pubs/EN-05-10023.pdf# nameddest=adoptiveparents (last visited Feb. 26, 2014).

[15] *See Sefcik v. Mouyos*, 869 N.E.2d 105, 108 (Ohio App. 2007) (noting that a child's birth certificate is *prima facie* evidence of parentage for inheritance purposes).

[16] *See Minors under Age 16*, U.S. Dept. of State, U.S. Passports & Int'l Travel, http://travel.state.gov/passport/get/minors/minors_834.html (last visited Feb. 26 2014); *New U.S. Birth Certificate Requirement*, U.S. Dept of State, U.S. Passports & Int'l Travel, http://travel.state.gov/ passport/ passport_5401.html (last visited Feb. 26, 2014) (certified birth certificates

inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities.

The benefits of state-sanctioned marriage are extensive, and the injuries raised by Plaintiffs represent just a portion of the harm suffered by same-sex married couples due to Ohio's refusal to recognize and give legal effect to their lawful unions.

6. Potential State Interests

Defendants advance a number of interests in support of Ohio's marriage recognition ban. (Doc. 20 at 32-36). Defendants cite "the decision to preserve uniformly the traditional definition of marriage without regard to contrary determinations by some other jurisdictions," "avoiding judicial intrusion upon a historically legislative function," "assur[ing] that it is the will of the people of Ohio ... that controls," "approaching social change with deliberation and due care," and "[p]reserving the traditional definition of marriage," although they raise these interests in the context of a rational basis equal protection analysis. (*Id.*) Although strict scrutiny is implicated by more than one fundamental right threatened by the marriage recognition ban, even in the intermediate scrutiny context, these vague, speculative, and/or unsubstantiated state interests rise nowhere near the level necessary to counterbalance the specific, quantifiable, particularized injuries detailed above

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listing full names of applicant's parents must be submitted with passport application as evidence of citizenship).

suffered by same-sex couples when their existing legal marriages and the attendant protections and benefits are denied to them by the state. In particular, the Court notes that **given that all practicing attorneys, as well as the vast majority of all citizens in this country, are fully aware that unconstitutional laws cannot stand, even when passed by popular vote, Defendants' repeated appeal to the purportedly sacred nature of the will of Ohio voters is particularly specious.**

The stated interest in "preserving the traditional definition of marriage" is not a legitimate justification for Ohio's arbitrary discrimination against gays based solely on their sexual orientation. As federal judge John G. Heyburn II eloquently explained in invalidating Kentucky's similar marriage recognition ban:

> Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused – even angry – when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.
>
> Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that

> act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.
>
> **The beauty of our Constitution is that is accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.**

Bourke v. Beshear, 2014 WL 556729, at 10 (W.D. Ky. Feb. 12, 2014) (emphasis supplied) (declaring Kentucky's anti-recognition provisions unconstitutional on equal protection grounds).

Defendants argue that *Windsor* stressed that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." 133 S. Ct. at 2692. However, as this Court emphasized in *Obergefell*, this **state regulation of marriage is "subject to constitutional guarantees"** and "the fact that each state has the exclusive power to create marriages within its territory does not logically lead to the

conclusion that states can nullify already-established marriages absent due process of law." 962 F. Supp. 2d at 981.

Quintessentially, as the Supreme Court has held, marriage confers "a dignity and status of immense import." *Windsor*, 133 U.S. at 2692. When a state uses "its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhance[s] the recognition, dignity, and protection of the class in their own community." *Id.* Here, based on the record, Defendants have again failed to provide evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer when they lose this immensely important dignity, status, recognition, and protection, as such a state interest does not exist.

Accordingly, Ohio's refusal to recognize same-sex marriages performed in other jurisdictions violates the substantive due process rights of the parties to those marriages because it deprives them of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so.

C. Equal Protection Clause

This Court's analysis in *Obergefell* also compels the conclusion that Defendants violate Plaintiffs' right to equal protection by denying recognition to their marriages and the protections for families attendant to marriage. In *Obergefell*, this Court noted Ohio's long history of respecting out-of-state marriages if valid in the place of celebration, with only the marriages of same-sex couples singled

out for differential treatment. 962 F. Supp. 2d at 983-84.

Under Ohio law, if the Henry/Rogers, Yorksmith, and Noe/McCracken couples' marriages were accorded respect, both spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple. *See* Ohio Rev. Code § 3111.95 (providing that if "a married woman" uses "non-spousal artificial insemination" to which her spouse consented, the spouse "shall be treated in law and regarded as" the parent of the child, and the sperm donor shall have no parental rights); *see also* Ohio Rev. Code § 3111.03 (providing that a child born to a married couple is presumed the child of the birth mother's spouse).

An Ohio birth certificate is a legal document, not a medical record. Birth certificates for newborn babies are generated by Defendants through use of the Integrated Perinatal Health Information System ("IPHIS") with information collected at birth facilities.[17] Informants are advised that "[t]he birth

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[17] A suggested worksheet is provided to the hospital or other birth facility by the Ohio Depart-ment of Health for use by the birth mother or other informant. A copy of the worksheet can be found at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=5&Content=5994 (last visited Feb. 28, 2014). The hospital or birth facility then enters the information gathered into the IPHIS. Two flow sheets describing the typical sequence of steps leading to a birth certificate can be found at *Birth Facility Easy-Step Guide For IPHIS*, pages 4-5, Ohio Department of Health,

certificate is a document that will be used for important purposes including proving your child's age, citizenship and parentage. The birth certificate will be used by your child throughout his/her life."[18] **The Ohio Department of Health routinely issues birth certificates naming as parents both spouses to opposite-sex married couples who use AI to conceive their children.**[19] However, Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth certificates identifying both women in these couples as parents of their expected children. (Doc. 15 at ¶¶ 59-62).

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http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=519&Content=4597 (last visited Feb. 28, 2014).

[18] *Mother's Worksheet for Child's Birth*, available at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3&TopicRelationID=5&Content=5994 (last visited February 28, 2014).

[19] *See* Ohio Rev. Code § 3111.03(A)(1) ("[a] man is presumed to be the natural father of a child," including when "[t]he man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement"); *see also* Ohio Rev. Code § 3111.95(A) ("If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband."); Ohio Rev. Code § 3705.08(B) ("All birth certificates shall include a statement setting forth the names of the child's parents. . . ").

Similarly, when an Ohio-born child is adopted by the decree of a court of another state, the Ohio Department of Health "shall issue ... a new birth record using the child's adoptive name and the names of and data concerning the adoptive parents." Ohio Rev. Code § 3705.12(A)(1). However, the Department of Health refuses to comply with this requirement based on Ohio Rev. Code § 3107.18(A), which provides that "[e]xcept when giving effect to such a decree would violate the public policy of this state, a court decree ... establishing the relationship by adoption, issued pursuant to due process of law by a court of any jurisdiction outside this state ... shall be recognized in this state."

Before Governor Kasich's administration and prior-Defendant Wymyslo's leadership of the Department of Health, Ohio recognized out-of-state adoption decrees of same-sex couples and supplied amended birth certificates identifying the adoptive parents. (*See* Docs. 4-6, 4-7, and 4-8). However, the current administration takes the position that issuing birth certificates under such circumstances would violate "public policy," *i.e.*, Ohio's purported limitation on adoptions within the State to couples only if those couples are married. O.R.C. § 3107.03(A). **If the Vitale/Talmas spouses were an opposite-sex couple, Defendant Himes would recognize their marriage, their New York adoption decree, and their right to an accurate birth certificate for Adopted Child Doe.**

1. Heightened Scrutiny

As the Court discussed in *Obergefell*, the Sixth Circuit has not reviewed controlling law regarding the appropriate level of scrutiny for reviewing

classifications based on sexual orientation, such as Ohio's marriage recognition ban, since *Windsor*. 962 F. Supp. 2d at 986. The most recent Sixth Circuit case to consider the issue, *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012), rejected heightened scrutiny by relying on *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), which in turn relied on *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997). As the Court concluded in *Obergefell*, however, *Equality Foundation* now rests on shaky ground and there are "ample reasons to revisit the question of whether sexual orientation is a suspect classification," including the fact that Sixth Circuit precedent on this issue – *Equality Foundation* among it – is based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overruled by *Lawrence*, 549 U.S. at 558. *Bassett v. Snyder*, No. 12-10038, 2013 WL 3285111, at *1 (E.D. Mich. June 28, 2013) (same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employer benefits).[20] The Supreme Court, in overruling *Bowers*, emphatically declared that it

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[20] *See also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in Lawrence 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class'") (citations omitted); *Golinski*, 824 F. Supp. 2d at 984 ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*").

"was not correct when it was decided and is not correct today." *Lawrence*, 539 U.S. at 578.

As a result, this Court held in *Obergefell* that lower courts without controlling post-*Lawrence* precedent on the issue should now apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny. 962 F. Supp. 2d at 987. The Court then analyzed the four factors that, to varying degrees, may be considered to determine whether classifications qualify as suspect or quasi-suspect: whether the class (1) has faced historical discrimination, (2) has a defining characteristic that bears no relation to ability to contribute to society, (3) has immutable characteristics, and (4) is politically powerless. *Id.* at 987-91. The Court concluded that "[s]exual orientation discrimination accordingly fulfills all the criteria the Supreme Court has identified, thus Defendants must justify Ohio's failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis," and finally that Defendants "utterly failed to do so." *Id.* at 991. Subsequent to *Obergefell*, the Ninth Circuit similarly held that *Windsor* "requires heightened scrutiny" for classifications based on sexual orientation. *Smithkline Beechan Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014) ("we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection... Thus, there can no longer be any question that gays and lesbians are no longer a 'group or class of individuals normally subject to 'rational basis' review.'") (citation omitted). The Court's entire *Obergefell* analysis applies and controls here, and classifications based on sexual

orientation must pass muster under heightened scrutiny to survive constitutional challenge.

Here, Defendants' discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. Defendants withhold accurate birth certificates from these children, burdening the children because their parents are not the opposite-sex married couples who receive the State's special stamp of approval. **The Supreme Court has long held that disparate treatment of children based on disapproval of their parents' status or conduct violates the Equal Protection Clause.** *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (striking down statute prohibiting undocumented immigrant children from attending public schools because it "imposes its discriminatory burden on the basis of a legal characteristic over which the children can have little control").[21] Such discrimination also

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[21] *See also Mathews v. Lucas*, 427 U.S. 495, 505 (1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust'"); *Weber v. Aetna Ca. Sur. Co.*, 406 U.S. 164, 175 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Walton v. Hammons*, 192 F.3d 590, 599 (6th Cir. 1999) (holding state could not withhold children's food stamp support based on their parents' non-cooperation in establishing paternity of their children).

triggers heightened scrutiny. *See, e.g., Pickett v. Brown*, 462 U.S. 1, 8 (1983).

The children in Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal parents, reflected on their birth certificates and given legal respect, without a sufficient justification. No such justification exists.

2. Rational Basis

As the Court further held in *Obergefell*, even if no heightened level of scrutiny is applied to Ohio's marriage recognition bans, they still fail to pass constitutional muster. 962 F. Supp. 2d at 991. The Court noted that "[e]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained," that "some objectives ... are not legitimate state interests," and, even when a law is justified by an ostensibly legitimate purpose, that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Romer*, 517 U.S. at 632; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633 (emphasis supplied); *see also Windsor*, 133 S. Ct. at 2693; *City of Cleburne, Tex.*, 473 U.S. at 450; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534

(1973). This Court concluded by noting that in *Bassett*, 2013 WL 3285111 at 24-26, the court held that same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employee benefits where "[t]he historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians." The Court further determined that a review of the historical background and legislative history of the laws at issue and the evidentiary record established conclusively that the requested relief must also be granted to Plaintiffs on the basis of the Equal Protection Clause. *Obergefell*, 962 F. Supp.2d at 993.

Again, the Court's prior analysis controls, and Ohio's marriage recognition bans also fail rational basis review.

3. Potential State Interests

This Court has already considered and rejected as illegitimate and irrational any purported State interests justifying the marriage recognition bans. *Obergefell*, 962 F. Supp. 2d at 993-95. Based on this controlling analysis, the government certainly cannot meet its burden under heightened scrutiny to demonstrate that the marriage recognition ban is necessary to further important State interests. All advanced State interests are as inadequate now as they were several months ago to justify the discrimination caused by the marriage recognition ban and the ban's particularly harmful impact on Ohio-born children.

Of particular relevance to this case, in *Obergefell* this Court analyzed and roundly rejected any claimed government justifications based on a preference for procreation or childrearing by heterosexual couples. 962 F. Supp. 2d at 994. This Court further concluded that **the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples.** *Id.* at n.20. In fact, the U.S. Supreme Court in *Windsor* (and more recently, numerous lower courts around the nation) similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same false conjectures about child welfare this Court rejected in *Obergefell*, and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them. Instead, the Supreme Court concluded:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for **no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity**. By seeking to displace this protection and

> treating those persons as living in marriages less respected than others [the federal government's non-recognition of marriages is unconstitutional].

Windsor, 133 S. Ct. at 2696 (emphasis supplied). All of the federal trial court court decisions since *Windsor* have included similar conclusions on this issue, including that child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples.[22]

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[22] *See, e.g.*, *De Leon*, 2014 WL 715741 (declaring unconstitutional Texas bans on same-sex marriage and out-of-state marriage recognition, and rejecting as irrational purported childrearing and procreation justifications); *Bostic*, 2014 WL 561978 at 18 (declaring unconstitutional Virginia's marriage ban, which has the effect of "needlessly stigmatizing and humiliating children who are being raised" by same-sex couples and "betrays" rather than serves an interest in child welfare); *Bourke*, 2014 WL 556729 at 8 (rejecting purported government interest in withholding marriage recognition to advance procreation and childrearing goals, and holding Kentucky's marriage recognition ban, similar to Ohio's, unconstitutional); *Bishop*, 2014 WL 116013 at 28–33 (rejecting purported government interests in responsible procreation and childrearing as justifications for Oklahoma's same-sex marriage ban, which was held unconstitutional); *Kitchen*, 2013 WL 6697874 at 25–27 (declaring Utah's marriage ban unconstitutional and finding that same-sex couples' "children are also worthy of the State's protection, yet" the marriage ban "harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples"); *Griego v. Oliver*, No. 34-306, 2013 WL 6670704, at 3 (D.N.M. Dec. 19, 2013) (rejecting "responsible procreation and childrearing" rationales to justify New Mexico's marriage ban, and declaring ban in violation of state constitution).

In sum, under Supreme Court jurisprudence, and as confirmed in numerous recent trial court decisions, states do not have any governmental interest sufficient to justify their refusal to recognize lawful out-of-state marriages between same-sex couples.[23]

D. Full Faith and Credit

Because this Court has found that Ohio's marriage recognition bans are constitutionally invalid on their face and unenforceable, Defendants no longer have a basis on which to argue that recognizing same-sex marriages on out-of-state adoption decrees violates Ohio public policy, and thus it is unnecessary to reach Plaintiffs' arguments based on the Full Faith and Credit Clause. However, the Court determines that, as expressed *infra* in endnote i, Plaintiffs have also demonstrated a compelling basis on which to find, and the Court does so find, that **Plaintiffs Vitale and Talmas have a right to full faith and credit for their New York adoption decree here in Ohio.**[i]

E. Irreparable Harm

Finally, Plaintiffs have easily met their burden to demonstrate they are suffering irreparable harm from Defendants' violation of their rights to due process, equal protection, and full faith and credit for their adoption decrees. Birth certificates are vitally important documents. As outlined above,

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[23] Again, the Court's Order today does NOT require Ohio to authorize the performance of same-sex marriage in Ohio. Today's ruling merely requires Ohio to recognize valid same-sex marriages lawfully performed in states which authorize such marriages.

Ohio's refusal to recognize Plaintiffs' and other same-sex couples' valid marriages imposes numerous indignities, legal disabilities, and psychological harms. Further, the State violates Plaintiffs' and other same-sex couples' fundamental constitutional rights to marry, to remain married, and to function as a family.

"Constitutional violations are routinely recognized as causing irreparable harm unless they are promptly remedied." *Obergefell*, 962 F. Supp. 2d at 996; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (violation of the right to travel interstate constitutes irreparable injury). Without a permanent injunction and declaratory relief, the affected same-sex couples and their children would have to continue to navigate life without the birth certificates that pave the way through numerous transactions, large and small. They would needlessly suffer harmful delays, bureaucratic complications, increased costs, embarrassment, invasions of privacy, and disrespect. Same-sex couples' legal status as parents will be open to question, including in moments of crisis when time and energy cannot be spared to overcome the extra hurdles Ohio's discrimination erects.[24] The marital status of the

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[24] For example, families can be barred in hospitals from their loved ones' bedsides due to a lack of legally-recognized relationship status. (*Id.* Doc. 17-3 at ¶ 23). And, although Ohio same-sex couples may obtain co-custody agreements for their children, such an agreement "does not ... create the full rights and responsibilities of a legally recognized child-parent relationship." (*Id.* at ¶ 19). Moreover, inheritance is governed in

couples will likewise be open to question, depriving these families of the far-reaching security, protections, and dignity that come with recognition of their marriages.

Plaintiffs and other affected same-sex couples require injunctive and declaratory relief to lift the stigma imposed by Defendants' disrespect for their spousal and parental statuses. Imposition of these burdens on same-sex couples serves no legitimate public interest that could counteract the severe and irreparable harm imposed by the marriage recognition bans.

Plaintiffs have therefore more than adequately demonstrated their entitlement to declaratory and injunctive relief.[ii]

IV. CONCLUSION

Accordingly, based on the foregoing, Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 18) is hereby **GRANTED**. Specifically:

1. The Court finds that those portions of Ohio Const. Art. XV, § 11, Ohio Rev. Code § 3101.01(C), and any other provisions of the Ohio Revised Code that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in other jurisdictions, violate

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part by parentage (*Id.* at ¶¶ 21, 24, 30), and children are entitled to bring wrongful death actions (Doc. 17-7 at ¶ 37). Indeed, "[s]ame-sex married couples and their children live in an Ohio that automatically denies most state and federal rights, benefits and privileges to them." (*Id.* at ¶ 103).

rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriages recognized and accepted as legal in Ohio and the enjoy the rights, protections, and benefits of marriage provided to heterosexual married couples under Ohio law, are denied significant liberty interests and fundamental rights without due process of law and in violation of their right to equal protection.

2. Defendants and their officers and agents are permanently enjoined from (a) enforcing the marriage recognition ban, (b) denying same-sex couples validly married in other jurisdictions all the rights, protections, and benefits of marriage provided under Ohio law, and (c) denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions. The Court will separately issue an Order of Permanent Injunction to this effect.

3. Defendants shall issue birth certificates to Plaintiffs for their children listing <u>both</u> same-sex <u>parents</u>.

IT IS SO ORDERED.[25]

Date: 4/14/14

s/ Timothy S. Black
Timothy S. Black
United States District Judge

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[25] The Court STAYS enforcement of this Order and the Permanent Injunction until the parties have briefed whether or not this Court should fully stay its Orders until completion of appeal to the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court. The Court is inclined to stay its finding of facial unconstitutionality but not to stay the Orders as to the as-applied claims of the four couples who are Plaintiffs because they have demonstrated that a stay will harm them individually due to the imminent births of their children and other time-sensitive concerns. The Court inclines toward a finding that the issuance of correct birth certificates for Plaintiffs' children, due in June or earlier, should not be stayed. The Court is further inclined to conclude that the Defendants will not be harmed by compliance with the requirements of the United States Constitution. Nevertheless, Plaintiffs shall file today their memorandum *contra* Defendants' oral motion to stay, and Defendants shall file a reply memorandum before 3:00 p.m. tomorrow. The Court shall then rule expeditiously.

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[1] Article IV, § 1 of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." In incorporating this clause into our Constitution, the Framers "foresaw that there would be a perpetual change and interchange of citizens between the several states." *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312, 315 (1839). The Supreme Court has explained that the "animating purpose" of the full faith and credit command is:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1988) (quoting *Milwaukee Cnty v. M.E., White Co.*, 296 U.S. 268, 277 (1935)).

In the context of judgments, the full faith and credit obligation is exacting, giving nationwide force to a final judgment rendered in a state by a court of competent jurisdiction. *Baker*, 522 U.S. at 233. Proper full faith and credit analysis distinguishes between public acts, which may be subject to public policy exceptions to full faith and credit, and judicial proceedings, which decidedly are not subject to any public policy exception to the mandate of full faith and credit *See id.* at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments"); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437 (1943) ("The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another").

The Supreme Court has thus rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment contrary to is own public policies. According to the Court, "our decisions support no roving 'public policy exception' to the full faith and credit due judgments." *Baker*, 522 U.S. at

233; *see also Estin v. Estin*, 334 U.S. 541, 546 (1948) (Full Faith and Credit Clause "ordered submission ... even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it"); *Williams v. North Carolina*, 317 U.S. 287 (1942) (requiring North Carolina to recognize change in marital status effected by Nevada divorce decree contrary to laws of North Carolina).

Consistent with the guarantee of full faith and credit, Defendant Himes's Department of Health is mandated under a provision of the Vital Statistics section of the Ohio Code to issue an amended birth certificate upon receipt of an adoption decree issued by the court of another state. Pursuant to Ohio Revised Code § 3705.12(A) and (B), upon receipt of a decree of adoption of an Ohio-born child, issued with due process by the court of another state, "the department of health shall issue, unless otherwise requested by the adoptive parents, a new birth record using the child's adopted name and the names of and data concerning the adoptive parents... ." This statute does not leave discretion in Defendant Himes's hands to reject duly issued out-of-state adoption decrees based on whether the adoption could have been obtained under Ohio law.

Indeed, as already discussed, before the tenure of prior-Defendant Wymyslo, Ohio issued amended birth certificates based on the out-of-state adoption decrees of same-sex parents, notwith-standing Ohio's purported policy against adoptions by unmarried couples within the State. Only recently has the Department of Health taken the position that Ohio Revised Code. § 3107.18, a separate provision of the "Adoption" section of the Code, frees it of its obligation to issue a corrected birth certificate upon receipt of another state's duly issued judgment of adoption decreeing a same-sex couple as adoptive parents. (Doc. 4-6 at 4-5). According to Defendant Himes, that provision requires the Department of Health to refuse recognition to out-of-state adoption decrees of same-sex parents, whose marriages are disrespected under Ohio law, because "giving effect to such a decree would violate the public policy of this state." Ohio Revised Code § 3107.18.

This backward evolution in Ohio, from granting accurate birth certificates to adoptive same-sex parents and their

children, to the current administration's refusal to do so, is yet another manifestation of the irrational animus motivating Defendants' discriminatory treatment of lesbian and gay families. The application of section 3107.18's "public policy" exception to the adoption decree of another state is contrary to Ohio's consistent recognition of the duly-issued adoption decrees of state courts of competent jurisdiction nationwide. *See, e.g., Matter of Bosworth*, No. 86-AP-903, 1987 WL 14234, at *2 (Ohio Ct. App. 10th Dist. July 16, 1987) (recognizing Florida adoption decree because, "if due process was followed by another state's court in issuing an adoption decree, an Ohio court is mandated to give full faith and credit to that state's decree"); *Matter of Swanson*, No. 90-CA-23, 1991 WL 76457 (Ohio Ct. App. 5th Dist. May 3, 1991) (recognizing New York adoption decree over objection of Ohio biological parents). Defendant Himes impermissibly injects a "roving 'public policy exception' to the full faith and credit due judgments," precisely what the Supreme Court has made clear the Full Faith and Credit Clause prohibits.

The duty to effectuate this command has commonly fallen on state courts in actions to enforce judgments obtained in out-of-state litigation, which is why many Supreme Court cases identify state courts as violators of the state's full faith and credit obligations. *See Adar v. Smith*, 639 F.3d 146, 171 (5th Cir. 2011) (Weiner, J., dissenting) (citing *Guinness PLC v. Ward*, 955 F.2d 875, 890 (4th Cir. 1992) ("[U]nder the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first")). However, this historical fact does not dictate that the command is directed only to state courts. For example, now "all but two or three of the fifty states have enacted some version of the Revised Uniform Enforcement of Foreign Judgments Act, which authorizes non-judicial officers to register out-of-state judgments, thereby entrusting to them their states' obligations under the [Full Faith and Credit] Clause." *Adar*, 639 F.3d at 171 (Weiner, J., dissenting) (citation omitted). Ohio's vital statistics statutes likewise transfer to state executive officials the responsibility to receive and recognize out-of-state judgments of adoption and to issue amended Ohio birth

certificates based on those judgments. *See* Ohio Revised Code § 3705.12(A) and (B).

The Fifth Circuit stands alone in holding that federal claims to enforce rights conferred by the Full Faith and Credit Clause are unavailable under § 1983 against non-judicial state officials. *Adar*, 639 F.3d at 153. Given that § 1983 creates a remedy for those denied "rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983, and that the Supreme Court has repeatedly held that § 1983 is a remedial statute that must be applied expansively to assure the protection of constitutional rights (*see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978) (§ 1983 is "to be broadly construed, against all forms of official violation[s] of federally protected rights"); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (§ 1983's coverage is to be "broadly construed"); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 528 (6th Cir. 1994) (same)), other circuits have unremarkably entertained such claims. *See Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (adjudicating full faith and credit claim against state actors on the merits in § 1983 action); *United Farm Workers v Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (same); *Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1059 (6th Cir. 1977) (propriety of § 1983 claim in federal court to enforce full faith and credit obligation against state judge not questioned, but abstention deemed warranted).

The Supreme Court has employed a three-part test, articulated in *Golden State Transit Corp.*, 493 U.S. at 106, to determine whether a constitutional provision creates a right actionable under § 1983: whether the provision 1) "creates obligations binding on the governmental unit," 2) that are sufficiently concrete and specific as to be judicially enforced, and 3) were "intended to benefit the putative plaintiff." *Dennis v. Higgins*, 498 U.S. 439, 449 (1991) (internal quotations and citations omitted). The Full Faith and Credit Clause explicitly creates obligations binding on the states, is concrete and judicially recognizable, and was intended to protect the rights of individuals to require respect across state lines for judgments in their favor. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 n.23 (1980) ("[T]he purpose of [the Clause] was to preserve rights acquired or confirmed under the ... judicial proceedings

of one state by requiring recognition of their validity in other states. ...") (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 501 (1939)); *Magnolia Petroleum Co.*, 320 U.S. at 439 (referring to the Clause as preserving judicially established "rights"); *see also Adar*, 639 F.3d at 176 (Weiner, J., dissenting) ("For all the same reasons advanced by the Dennis Court in recognizing the private federal right created by the Commerce Clause... the [Full Faith and Credit] Clause indisputably does confer a constitutional 'right' for which § 1983 provides an appropriate remedy").

In *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), a § 1983 action, the Tenth Circuit held that Oklahoma was required to issue an amended birth certificate listing as parents both members of a California same-sex couple that had legally adopted a child born in Oklahoma, notwithstanding Oklahoma's prohibition against such adoptions within the state. *Id.* at 1141-42. Oklahoma, like Ohio, had a statute providing for issuance of amended birth certificates for children adopted in other states' courts. The Tenth Circuit ruled that the Full Faith and Credit Clause required Oklahoma "to apply its own law to enforce [those] adoption order[s] in an 'even-handed' manner." *Id.* at 1154 (citing *Baker*, 522 U.S. at 235). The Tenth Circuit concluded: "We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause." *Id.* at 1156. Oklahoma's "refusal to recognize final adoption orders of other states that permit adoption by same-sex couples" was therefore "unconstitutional." *Id.*

The principles and precedent outlined above provide a compelling basis to conclude that the Full Faith and Credit Clause also requires full recognition of Plaintiffs Vitale's and Talmas's New York adoption decree, and this Court so holds.

(As in *Obergefell*, this Court again acknowledges the continuing pendency of Section 2 of the discredited federal Defense of Marriage Act ("DOMA"), which was not before the Supreme Court in *Windsor*, and wherein Congress has sought to invoke its power under the Full Faith and Credit Clause to establish that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex

that is treated as a marriage under the laws of such other State," 28 U.S.C. § 1738C. However, as in *Obergefell*, although Section 2 of DOMA is not specifically before the Court, the implications of today's ruling speak for themselves.)

[ii] However, the Court agrees with Defendants that Plaintiff Adoption S.T.A.R. lacks standing to pursue its claims. Rather than relying on its own rights, Adoption S.T.A.R. purports to bring this action "on behalf of its clients who seek to complete adoptions" involving Ohio-born children and seeks relief for any ... "same-sex couples married in [other] jurisdiction ... who become clients of Plaintiff Adoption S.T.A.R. ..." (Doc. 1 at 17). To establish Article III standing, a plaintiff must show that an injury is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotations omitted). Adoption S.T.A.R. bears the burden of proving each element of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

"[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal quotations omitted). If a party can demonstrate injury, however, that party may pursue the rights of others when it can establish that (1) "the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Boland v. Holder*, 682 F.3d 531, 537 (6th Cir. 2012) (internal quotations omitted). The concept of third-party standing is typically disfavored. *Kowalski*, 543 U.S. at 130; *see also Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (outlining reasons why "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation").

Here, Adoption S.T.A.R. fails to satisfy its burden of establishing standing because it fails to satisfy the hindrance requirement. Adoption S.T.A.R. must demonstrate that its

clients face some obstacle "in litigating their rights themselves." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209 (6th Cir. 2011). In analyzing this question, the United States Supreme Court has generally looked for "daunting" barriers or "insurmountable procedural obstacles" to support a finding of hindrance. *See Miller v. Albright*, 523 U.S. 420, 449-50 (1998) (O'Connor, J., concurring, Kennedy, J., joining) ("A hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so"). Adoption S.T.A.R. has not shown that same-sex couples married in other jurisdictions are hindered from litigating their own rights, and the participation of the other Plaintiffs in this lawsuit demonstrates that such parties are capable of doing so. Moreover, because birth certificates can be amended and reissued, there are no significant time restrictions on the ability of potential third parties to bring their own actions. Under these circumstances, where the time constraints and logistical and emotional burdens that prevented injured third parties from vindicating their rights in *Obergefell* do not exist, there is no basis for departing from the ordinary rule that "one may not claim standing ... to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

Consequently, the Court finds that Plaintiff Adoption S.T.A.R. lacks standing to pursue its claims. The Court also notes, however, that given today's ruling, the question of Adoption S.T.A.R.'s standing is ultimately of no practical effect.

Happy Adoption Day
Words and Music by John McCulcheon
© 1992 John McCutcheon/Appalsongs (ASCAP)

Oh who would have guessed, who could have seen
Who could have possibly known
All these roads we have traveled, the places we've been
Would have finally taken us home.

So here's to you, three cheers to you
Let's shout it, "Hip, hip horray!"
For out of a world so tattered and torn,
You came to our house on that wonderful morn
And all of a sudden this family was born
Oh, happy Adoption Day!

There are those who think families happen by chance
A mystery their whole life through
But we had a voice and we had a choice
We were working and waiting for you.

So here's to you, three cheers to you
Let's shout it, "Hip, hip horray!"
For out of a world so tattered and torn,
You came to our house on that wonderful morn
And all of a sudden this family was born
Oh, happy Adoption Day!

No matter the time and no matter the age
No matter how you came to be
No matter the skin, we are all of us kin
We are all of us one family.

So here's to you, three cheers to you
Let's shout it, "Hip, hip horray!"
For out of a world so tattered and torn,
You came to our house on that wonderful morn
And all of a sudden this family was born
Oh, happy Adoption Day!

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:13-cv-501
Judge Timothy S. Black

JAMES OBERGEFELL, *et al.*,
Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., *et al.*,
Defendants.

FINAL ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

This civil case is before the Court for final decision on Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 53), the record evidence (Docs. 34, 42-47, 61; *see* Appendix at pp. 49-50[i]), Defendants' memorandum in opposition (Doc. 56), Plaintiffs' reply (Doc. 62), and oral argument held on December 18, 2013. Plaintiffs include two individuals who entered into legal same-sex marriages in states that provide for such marriages and have been denied recognition of those legal marriages on their spouses' death certificates by the State of Ohio. Plaintiffs seek a declaratory judgment that, as applied to them, Ohio's ban on the recognition of legal same-sex marriages granted in other states is unconstitutional; and, therefore, that a permanent injunction compelling Defendants and

their officers to recognize Plaintiffs' marriages on Ohio death certificates is required under the law and the evidence. Also present as a Plaintiff is Robert Grunn, an Ohio funeral director, who seeks a declaration of his rights and duties when preparing death certificates for individuals in same-sex marriages. Defendants are the local and state officers responsible for death certificates.

OVERVIEW

The Court's ruling today is a limited one, and states simply, that under the Constitution of the United States, Ohio must recognize valid out-of-state marriages between same-sex couples on Ohio death certificates, just as Ohio recognizes all other out-of-state marriages, if valid in the state performed, and even if not authorized nor validly performed under Ohio law, such as marriages between first cousins, marriages of certain minors, and common law marriages.

That is, once you get married lawfully in one state, another state cannot summarily take your marriage away, because the right to remain married is properly recognized as a fundamental liberty interest protected by the Due Process Clause of the United States Constitution. U.S. Const. amend. XIV, § 1.

Moreover, as this Court held in its initial Orders this summer and reaffirms today, by treating lawful same-sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins, marriages of certain minors, and common law marriages), Ohio law, as applied to these Plaintiffs, violates the United States Constitution's

guarantee of equal protection: that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1.

Therefore, under the Constitution of the United States, Ohio must recognize on Ohio death certificates valid same-sex marriages from other states.

This conclusion flows from the *Windsor* decision of the United States Supreme Court this past summer, which held that the federal government cannot refuse to recognize a valid same-sex marriage. *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013). And now it is just as Justice Scalia predicted[1] – the lower courts are applying the Supreme Court's decision,[2] as they must, and the

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[1] In a vigorous dissent to the *Windsor* ruling, Justice Scalia predicted that the question whether states could refuse to recognize other states' same-sex marriages would come quickly, and that the majority's opinion spelled defeat for any state's refusal to recognize same-sex marriages authorized by a co-equal state. As Justice Scalia predicted: "no one should be fooled [by this decision] ... the majority arms well any challenger to a state law restricting marriage to its traditional definition ... it's just a matter of listening and waiting for the other shoe [to drop]." *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting).

[2] *See Griego v. Oliver*, No. 34,306, 2013 WL 6670704, at *22 (N.M. Dec. 19, 2013) ("Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution."); *see also Kitchen v. Herbert*, 2:13-CV-00217 (D. Utah Dec. 20, 2013) ("Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law.").

question is presented whether a state can do what the federal government cannot – *i.e.*, discriminate against same-sex couples ... simply because the majority of the voters don't like homosexuality (or at least didn't in 2004). Under the Constitution of the United States, the answer is no, as follows.[3]

I. ESTABLISHED FACTS

A. Marriage Law in Ohio

The general rule in the United States for interstate marriage recognition is the "place of celebration" rule, or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere. (Doc. 44-1 at ¶ 7). Historically, Ohio has recognized marriages that would be invalid if performed in Ohio, but are valid in the jurisdiction where celebrated. This is true even when such marriages clearly violate Ohio law and are entered into outside of Ohio with the purpose of evading Ohio's unwillingness to grant them. (*Id.*). Ohio departed from this tradition in 2004 to adopt its

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[3] As the Supreme Court has explained:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis supplied).

statutory and constitutional prohibitions on the recognition of marriages between two individuals of the same sex ("marriage recognition bans"). (*Id.* at ¶¶ 7, 32, 60). Prior to 2004, the Ohio legislature had never passed a law denying recognition to a specific type of marriage solemnized outside of the state. (*Id.* at ¶¶ 32, 51).

Ohio Revised Code Section 3101 was amended in 2004 to prohibit same-sex marriages in the state and to prohibit recognition of same-sex marriages from other states. Sub-section (C) provides the following:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.
>
> (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial

> proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio . . .
>
> (4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Ohio Rev. Code Ann. § 3101.01.

> Also adopted in 2004 was an amendment to the Ohio Constitution, which states:
>
> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const. art. XV, § 11.

At the time of the passage of these provisions, Governor Robert Taft stated that their purpose was "to reaffirm existing Ohio law with respect to our most basic, rooted, and time-honored institution: marriage between a man and a woman." He went on:

> Marriage is an essential building block of our society, an institution we must reaffirm. At a time when parents and families are under constant attack within our social culture, it is important to confirm and protect those environments that offer our children, and ultimately our society, the best opportunity to thrive.

(Doc. 41-1 at ¶ 72).

During the 2004 floor debates over the legislation, Senator Jeff Jacobson stated that the legislation would not interfere with "the way adults choose to order their lives" because "[a]dults can form household relationships" after the passage of the legislation even though those relationships "don't have all the bells and whistles," "[p]erhaps don't have all the opportunities," and do not appear "equal to everyone else's." (*Id.* at ¶ 59).

The primary sponsor for the 2004 Ohio constitutional amendment, Citizens for Community Values ("CCV"), described as its core principle its goal to protect Ohio from the "inherent dangers of the homosexual activists' agenda." (*Id.* at ¶ 82).

CCV sent letters to school boards and superintendents in Ohio warning them, erroneously, that they would face criminal and "daunting" civil liability if they took measures to protect lesbian and

gay students from violence and harassment. (*Id.* at ¶ 84). In one of CCV's campaign publications, the organization misled Ohio voters about the need for the amendment, stating that marriage equality advocates sought to eliminate age requirements for marriage, advocated polygamy, and sought elimination of kinship limitations so that incestuous marriages could occur. (*Id.* at ¶ 85). CCV warned Ohio employers that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." (*Id.* at ¶ 86). The television and media campaign in support of the amendment contained misleading statements, such as "[w]e won't have a future unless [heterosexual] moms and dads have children," and that "[e]very major social science study tells us time and again: families are stronger with a wife and a husband; children do better with a mother and a father." (*Id.* at ¶ 88).[4]

B. Plaintiffs James Obergefell, John Arthur (now deceased), David Michener, and Robert Grunn

Longtime Cincinnati residents James Obergefell and John Arthur met in 1992 and lived together in a loving, committed relationship for more than 20 years. (Doc. 3-1 at ¶¶ 2-3). In 2011, Mr.

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[4] With this Court's leave, CCV also filed an amicus brief in this case. (Doc. 61). Among its many remarkable and fundamentally baseless arguments, one of the most offensive is that adopted children are less emotionally healthy than children raised by birth parents.

Arthur was diagnosed with amyotrophic lateral sclerosis ("ALS"), a terminal illness. (*Id.* at ¶ 8). After the Supreme Court's decision in *Windsor* requiring the federal government to recognize valid same-sex marriages, Mr. Obergefell and Mr. Arthur decided to get married. (*Id.* at ¶ 11). On July 11, 2013, the couple boarded a medically equipped plane to travel to Maryland, a state that provides for same-sex marriages, and were married in the plane as it sat on the tarmac. (*Id.* at ¶ 12). Under Ohio law, their marriage was not recognized for any purpose until this Court granted them a temporary restraining order requiring that upon Mr. Arthur's death, his death certificate reflect that he was married and that Mr. Obergefell is his surviving spouse. (*Id.* at ¶ 13; Doc. 14). Mr. Arthur died on October 22, 2013, and his death certificate was issued in compliance with this Court's Order. (Docs. 51, 52). Without this Court ordering a permanent injunction, Mr. Arthur's death certificate would need to be amended to remove any mention of his husband, Mr. Obergefell, or their marriage. Ohio Rev. Code Ann. § 3705.22.

Plaintiff David Michener and his late spouse, William Herbert Ives, were together as a loving couple for 18 years and adopted three children together. (Doc. 21 at 1). On July 22, 2013, Mr. Michener and Mr. Ives were married in Delaware, a state that provides for same-sex marriages. (*Id.*) On August 27, 2013, Mr. Ives died unexpectedly of natural causes. (*Id.*) In order for the cremation of Mr. Ives' remains to proceed, a death certificate had to be issued, and Plaintiff Michener sought a death certificate that accurately reflected their marriage. (*Id.*) This Court entered a temporary restraining order granting such relief on September 3, 2013.

(Doc. 23). Without a permanent injunction, the Court-ordered death certificate of William Herbert Ives would need to be amended to remove any mention of Mr. Michener or their marriage. Ohio Rev. Code Ann. § 3705.22.

Robert Grunn is a licensed funeral director operating his business in Cincinnati, Ohio. (Doc. 34-1 at ¶¶ 2, 12). Mr. Grunn is a gay man and is known within the gay community as a gay-friendly funeral director. (*Id.* at ¶ 11). One of his responsibilities as a funeral director is to fill out death certificates, including the portion of the certificate indicating the deceased's marital status and the name of the surviving spouse. (*Id.* at ¶ 3). He uses Ohio Department of Health software to do this, and for deaths that occur in Cincinnati, he delivers the death certificates to the office of Defendant Camille Jones. (*Id.* at ¶¶ 3, 5). In his experience, his clients often do not realize the importance of death certificates until he returns certified copies to them. (*Id.* at ¶ 7). Mr. Grunn has multiple married gay or lesbian clients, including Mr. Obergefell, who utilized his services when Mr. Arthur died. (*Id.* at ¶¶ 13-15). In the future, Mr. Grunn is certain to face the question of how to fill out death certificates for married same-sex couples. (*Id.*) Mr. Grunn intends to record the marital status as "married" and list the surviving spouse of the next married decedent with a same-sex spouse that he serves, but fears that by doing so he may be prosecuted for purposely making a false statement on a death certificate. (*Id.* at ¶ 17). He seeks a declaration of his rights and duties when serving clients with same-sex spouses. (Doc. 53-1 at 12).

II. STANDARD OF REVIEW

An "as-applied challenge" to a law, as here, limits the relief to the particular circumstances of the plaintiff. A "facial challenge," not presented here, generally seeks to declare or enjoin a law as unconstitutional in all respects. In this case, Plaintiffs have requested injunctive and declaratory relief limited to the issue of marriage recognition on death certificates. The narrow breadth of the remedy employed by this Court reflects this distinction. *See Citizens United v. Fed. Elections Comm.*, 558 U.S. 310, 331 (2010).

A permanent injunction is appropriate if a party "can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)). It is within the sound discretion of the district court to grant or deny a motion for permanent injunction. *See Kallstrom*, 136 F.3d at 1067; *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994) (district court erred in failing to rule on permanent injunction request).

In the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Savoie v. Martin*, 673 F.3d 488, 495-96 (6th Cir. 2012) (quoting *Grand Trunk W. R. Co. v.*

Consol. Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984)). Both criteria for rendering a declaratory judgment are established here.

III. ANALYSIS

A. Due Process Clause

The Due Process Clause of the Fourteenth Amendment to the United States Constitution establishes that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. And "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" that is protected by the Due Process Clause. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).[5]

However, although neither the United States Court of Appeals for the Sixth Circuit nor the Supreme Court of the United States has spoken on the issue, most courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry. *See, e.g., Jackson v. Abercrombie*, 884

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[5] *See also Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.*, at 495-496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family – a relation as old and as fundamental as our entire civilization"); *see generally Washington v. Glucksberg*, 521 U.S. 702, 727 n.19 (1997) (citing cases).

F. Supp. 2d 1065, 1094-98 (D. Haw. 2012) ("Other courts considering claims that same-sex couples have a fundamental right to marry, have concluded that the right at issue is not the existing fundamental 'right to marry.'") (collecting cases).[6]

In situations like those of Plaintiffs, however, where same-sex couples legally marry outside of Ohio and then reside in Ohio, a different right than the fundamental right to marry is also implicated: here, the constitutional due process right at issue is not the right to marry, but, instead, the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections.[7]

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[6] *See also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306-07 (M.D. Fla. 2005) ("No federal court has recognized that [due process] . . . includes the right to marry a person of the same sex") (internal citation omitted); *Conaway v. Deane*, 932 A.2d 571, 628 (Md. App. 2007) ("[V]irtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole"); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("The right to marry is unquestionably a fundamental right . . . The right to marry someone of the same sex, however, is not "deeply rooted," it has not even been asserted until relatively recent times"). *But see Kitchen v. Herbert*, 2:13-CV-00217 (D. Utah Dec. 20, 2013).

[7] The concept of the right to remain married as a liberty interest protected by the Due Process Clause is eloquently advanced by Professor Steve Sanders in his article, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2011). This judge acknowledges significant reliance upon Professor Sanders's learned (and more extended) analysis of the fundamental right to remain married.

1. Right of Marriage Recognition

As the Supreme Court has observed, the idea of being married in one state and unmarried in another is one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens." *Williams v. North Carolina*, 317 U.S. 287, 299 (1942). In identifying the right to remain married as fundamental, Professor Sanders points out that the "[l]aw favors stability in legal relationships, vindication of justified expectations, and preventing casual evasion of legal duties and responsibilities." Sanders, 110 MICH. L. REV. at 1425. Moreover, the Supreme Court has established that existing marital, family, and intimate relationships are areas into which the government should generally not intrude without substantial justification. See Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984); see also Lawrence v. Texas, 549 U.S. 558, 578 (2003). Based on these principles, the concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state.[8]

The right to remain married is therefore properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution. Here, Ohio's marriage recognition bans violate this fundamental right without rational justification.

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[8] Joanna L. Grossman, Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws, 84 OR. L. REV. 433, 461 (2005) (historically, "[a]ll jurisdictions followed some version of lex loci contractus in evaluating the validity of a marriage").

a. Level of Scrutiny

As a general matter, the Supreme Court applies strict scrutiny when a state law encroaches on a fundamental right. Roe v. Wade, 410 U.S. 113, 155 (1973). While the right to marriage recognition has not historically been labeled "fundamental," in the Supreme Court cases establishing the highly-protected status of existing marriage, family, and intimate relationships, the Court has applied an intermediate standard of review falling between rational basis and strict scrutiny. See, e.g., Moore, 431 U.S. at 113 (1977) (balancing the state interests advanced and the extent to which they are served by the challenged law against the burden on plaintiff's rights); Zablocki v. Redhail, 434 U.S. 374 (1978) (same). As the Ninth Circuit has observed, in *Lawrence*, the "[Supreme] Court's rationale for its holding – the inquiry analysis that it was applying – is inconsistent with rational basis review." *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). The Ninth Circuit also took note of a post-*Lawrence* substantive due process case, *Sell v. United States*, 39 U.S. 166 (2003), in which the Supreme Court recognized a "significant constitutionally protected liberty interest" (but not a fundamental right) in "avoiding the unwanted administration of antipsychotic drugs." *Id.* at 178 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). The Supreme Court held that such intrusion on personal interests by the government was permissible only where it was "necessary significantly to further important governmental trial-related interests." *Id.* at 179. In other words, a mere legitimate interest would not suffice. The court's conclusion in *Witt* that, based on *Lawrence* and *Sell*,

intermediate scrutiny was appropriate is also applicable to the case at hand: for when "the government attempts to intrude upon the private lives of homosexuals," then "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 817.

Based on the foregoing, the balancing approach of intermediate scrutiny is appropriate in this similar instance where Ohio is intruding into – and in fact erasing – Plaintiffs' already-established marital and family relations.

b. Burden on Plaintiffs

When couples – including same-sex couples – enter into marriage, it generally involves long-term plans for how they will organize their finances, property, and family lives. "In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974).

Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it – including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage – will follow them. When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court. After

Lawrence, same-sex relationships fall squarely within this sphere, and when it comes to same-sex couples, a state may not "seek to control a personal relationship," "define the meaning of the relationship," or "set its boundaries absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S at 578.

For example, when a parent's legal relationship to her child is terminated by the state, it must present clear and convincing evidence supporting its action to overcome the burden of its loss. *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982). Here, in this case, a similar legal familial relationship is unilaterally terminated by Ohio's marriage recognition bans, without any due process.

Moreover, Ohio's official statutory and constitutional establishment of same-sex couples married in other jurisdictions as a disfavored and disadvantaged subset of people has a destabilizing and stigmatizing impact on them.

In striking down the statutory provision that had denied gay and lesbian couples federal recognition of their otherwise valid marriages, the Supreme Court in *Windsor* observed:

> [The relevant statute] tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . And it

> humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Windsor, 133 S. Ct. at 2694.

Ohio death certificates, which currently do not reflect legal marriages of same-sex couples outside of this litigation, are important not only for the dignity of the surviving spouse and his or her family, but also have evidentiary value for rights such as receiving life insurance payouts, claiming social security survivors benefits, administering wills, and title transfers for automobiles, real estate, and other property. (Doc. 34-1 at ¶ 6; Doc. 45-1 at ¶ 17). However, in Ohio, when a married person domiciled in Ohio who has a valid same-sex marriage from another jurisdiction dies, the estate administration unfolds as if the person had died unmarried, and the many rights afforded to surviving spouses under Ohio probate law are denied to same-sex surviving spouses. While, after *Windsor*, many federal tax laws that used to disfavor same-sex spouses over opposite-sex spouses no longer do so, Ohio's tax commission has refused to offer same-sex spouses equal rights under its regulations. (Doc. 45-1 at ¶¶ 40-43). Married same-sex couples must consider many additional burdens in their estate planning in order to try to protect their surviving spouse from financial vulnerability. (*Id.* at ¶¶ 50-65).

In the family law context, while opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. While Ohio courts allow an individual gay or lesbian person to adopt a child, a same-sex couple cannot. (Doc. 41-1 at ¶ 17). Same-sex couples are denied local and state tax benefits available to heterosexual married couples, denied access to entitlement programs (*e.g.*, Medicaid, food stamps, welfare benefits, *etc.*) available to heterosexual married couples and their families, barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legally-recognized relationship status, denied the remedy of loss of consortium when a spouse is seriously injured through the acts of another, denied the remedy of a wrongful death claim when a spouse is fatally injured through the wrongful acts of another, and evicted from their homes following a spouse's death because same-sex spouses are considered complete strangers to each other in the eyes of the law. (*Id.* at ¶ 23).

The benefits of state-sanctioned marriage are extensive, and the injuries raised and evidenced by Plaintiffs represent just a portion of the harm suffered by same-sex married couples due to Ohio's refusal to recognize and give the effect of law to their legal unions.

c. Potential State Interests

Defendants advance a number of interests in support of Ohio's marriage recognition bans. (Doc. 56 at 33-40). Defendants cite "Ohioans' desire to retain the right to define marriage through the democratic process," "avoiding judicial intrusion upon a historically legislative function," "Ohio's interest in approaching social change with deliberation and due care," "the desire not to alter the definition of marriage without evaluating steps to safeguard the religious rights and beliefs of others," and "[p]reserving the traditional definition of marriage," although they raise these interests in the context of a rational basis equal protection analysis. (*Id.*)

In the intermediate scrutiny context, however, these vague, speculative, and unsubstantiated state interests do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries evidenced here and suffered by same-sex couples when their existing legal marriages and the attendant protections and benefits are taken from them by the state.

Defendants argue that *Windsor* stressed that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2692. However, as Defendants acknowledge, this regulation is "subject to constitutional guarantees." (Doc. 56 at 18). As the Supreme Court has explained:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to

> establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis supplied).

Regardless of the justifications provided by an enactment's proponents, the Supreme Court has clearly stated that if such an enactment violates the U.S. Constitution – whether passed by the people or their representatives – judicial intervention is necessary to preserve the rule of law. *See, e.g., Watson v. City of Memphis*, 373 U.S. 526, 528 (1963) (rejecting appeal by city to permit delay in desegregation based on alleged "need and wisdom of proceeding slowly and gradually"). The electorate cannot order a violation of the Due Process or Equal Protection Clauses by referendum or otherwise, just as the state may not avoid their application by deferring to the wishes or objections of its citizens. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The fact that each state has the exclusive power to create marriages within its territory does not logically lead to the conclusion that states can nullify already-established marriages from other co-equal states absent due process of law. Perhaps the interests raised by Defendants may be more compelling in the context of marriage *creation* than they are in the context of marriages that have

already taken place and same-sex relationships that already exist, *i.e.*, marriage *recognition*.[9]

Defendants have not provided evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer when they lose, simply because they are in Ohio, the immensely important dignity, status, recognition, and protection of lawful marriage. As the Supreme Court held in *Windsor*, marriage confers "a dignity and status of immense import." *Windsor*, 133 U.S. at 2692.

Accordingly, Ohio's refusal to recognize same-sex marriages performed in other states violates the substantive due process rights of the parties to those marriages because it deprives them of their significant liberty interest in remaining married absent a sufficient articulated state interest for doing so or any due process procedural protection whatsoever.

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[9] The Court acknowledges the continuing pendency of Section 2 of the discredited federal Defense of Marriage Act ("DOMA"), which Section 2 was not before the Supreme Court in *Windsor*, and wherein Congress has sought to invoke its power under the Constitution's full faith and credit clause to state that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State," 28 U.S.C. § 1738C, but this Court states affirmatively that Section 2 of DOMA does not provide a legitimate basis for otherwise constitutionally invalid state laws, like Ohio's marriage recognition bans, no matter what the level of scrutiny. Although Section 2 of DOMA is not specifically before this Court, the implications of today's ruling speak for themselves. *See also Kitchen v. Herbert*, 2:13-CV-00217 (D. Utah Dec. 20, 2013).

2. Right to Marry

Although it is unnecessary to reach the issue of whether the fundamental right to marry itself also endows Ohio same-sex couples married in other jurisdictions with a significant liberty interest in their marriages for substantive due process purposes, the Court notes that a substantial logical and jurisprudential basis exists for such a conclusion as well.[10]

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[10] While states do have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual. Thus, "the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *see also Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State"); *Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . .").

In individual cases regarding parties to potential marriages with a wide variety of characteristics, the Supreme Court consistently describes a general "fundamental right to marry" rather than "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012) (citing *Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94-96; *Zablocki*, 434 U.S. at 383-86; *accord In re Marriage Cases*, 183 P.3d 384, 421 n.33 (Cal. 2008) (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage'"). And the Supreme Court held in *Lawrence* that the right of consenting adults (including same-sex couples) to engage in private, sexual intimacy is protected by the Fourteenth Amendment's protection of liberty.

notwithstanding the historical existence of sodomy laws and their use against gay people.

For the same reasons, the fundamental right to marry is "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though same-sex couples have not historically been allowed to exercise that right. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (citation omitted).

While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right once that right is recognized as one that due process protects. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430 (quotation omitted).

For example, when the Supreme Court held that anti-interracial marriage laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of excluding interracial couples from marriage. *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . "); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted).

Cases subsequent to *Loving* have similarly confirmed that the fundamental right to marry is available even to those who have not traditionally been eligible to exercise that right. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce, since doing so unduly burdened their fundamental right to marry again); *see also Zablocki*, 434 U.S. at 388-90 (state may not condition ability to marry on fulfillment of existing child support obligations). Similarly, the right to marry as traditionally understood in this country did not extend to

B. Equal Protection Clause

In addition to concluding that Ohio's marriage recognition bans are an impermissible and unconstitutional burden on Plaintiffs' significant liberty interest in the continued existence and recognition of their marriages under the Due Process Clause, this Court further finds and declares that Plaintiffs have also demonstrated that Ohio's same-sex marriage recognition bans further violate Plaintiffs' constitutional rights by denying them equal protection of the laws.

As the Court previously held:

> "The issue is whether the State of Ohio can discriminate against same-sex marriages lawfully solemnized out of state, when Ohio law has historically and unambiguously provided that the validity of a marriage is determined by whether it complies with the law of the jurisdiction where it was celebrated.
>
> Throughout Ohio's history, Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where

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people in prison. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). Nevertheless, in *Turner*, 482 U.S. at 95-97, the Supreme Court held that a state cannot restrict a prisoner's ability to marry without sufficient justification. Thus, when analyzing other fundamental rights and liberty interests in other contexts, the Supreme Court has consistently adhered to the principle that a fundamental right, once recognized, properly belongs to everyone.

> solemnized. Thus, for example, under Ohio law, out-of-state marriages between first cousins are recognized by Ohio, even though Ohio law does not authorize marriages between first cousins. Likewise, under Ohio law, out of state marriages of minors are recognized by Ohio, even though Ohio law does not authorize marriages of minors.
>
> How then can Ohio, especially given the historical status of Ohio law, single out same-sex marriages as ones it will not recognize? The short answer is that Ohio cannot . . . at least not under the circumstances here.
>
> By treating lawful same-sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), Ohio law, as applied to these Plaintiffs, violates the United States Constitution which guarantees that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."

(Doc. 13 at 1-2, Order Granting Plaintiffs' Motion for a Temporary Restraining Order, 7/22/13).

As to equal protection, to repeat the analysis previously stated by this Court and re-affirmed today:

> The Fourteenth Amendment to the United States Constitution provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis supplied).

Plaintiffs, two same-sex couples, were legally married in Maryland and Delaware. They reside in Ohio where their marriage is not recognized as valid. They are treated differently than they would be if they were in a comparable opposite-sex marriage. By treating lawful same-sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), the Ohio laws barring recognition of out-of-state same-sex marriages, enacted in 2004, violate equal protection principles.

Although the law has long recognized that marriage and domestic relations are matters generally left to the states, *see Ex parte Burrus*, 136 U.S. 586, 593-94 (1890), the restrictions imposed on marriage must nonetheless comply with the United States Constitution. *Loving*, 388 U.S. at 12 (statute limiting marriage to same-race couples violated equal protection and due process); *Zablocki*, 434 U.S. at 383 (statute restricting from marriage persons owing child support violated equal protection).

In *Windsor*, the Supreme Court again applied the principle of equal protection to a statute restricting marriage when it reviewed the constitutionality of the federal Defense of Marriage Act ("DOMA"), which denied recognition to same-sex marriages for purposes of federal law. This included marriages from the twelve states and District of Columbia in which same-sex couples could legally marry. The Supreme Court held that the federal law was unconstitutional because it violated equal

protection and due process principles guaranteed by the Fifth Amendment. *Windsor*, 133 S. Ct. at 2675.

In reality, the decision of the United States Supreme Court in *Windsor* was not unprecedented. The Court relied upon its equal protection analysis from a 1996 case holding that an amendment to a state constitution, ostensibly merely prohibiting any special protections for gay people, in truth violated the Equal Protection Clause under even a rational basis analysis. *Romer v. Evans*, 517 U.S. 620 (1996).

In *Romer*, the Supreme Court struck down Colorado's Amendment 2 because, the Court held, "[w]e cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635. The Supreme Court deemed this "class legislation . . . obnoxious to the prohibitions of the Fourteenth Amendment." *Id.* (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

As the Supreme Court held so succinctly in *Romer*: "[Colorado law] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause[.]" 517 U.S. at 635-36.

As the Supreme Court explained in striking down Section 3 of DOMA, "[t]he avowed purpose and practical effect of the law here in question are to

impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S. Ct. at 2693.

Similarly, in *Windsor*, the Supreme Court cited *U. S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), for the proposition that a legislative desire to harm a politically unpopular group of people cannot justify disparate treatment of that group. *Windsor*, 133 S. Ct. at 2693. In *Moreno*, a federal statute prohibiting households containing "unrelated persons" from qualifying for food stamps was held to be in violation of the Equal Protection Clause under a rational basis analysis. The legislative purpose of the statute was to prohibit "hippies" from taking advantage of food stamps. The Supreme Court held that "the classification here . . . is wholly without any rational basis." *Moreno*, 413 U.S. at 538. Likewise, in *Windsor*, the Supreme Court held that the purpose of the federal DOMA was "to impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694.

Under Supreme Court jurisprudence, states are free to determine conditions for valid marriages, but these restrictions must be supported by legitimate state purposes because they infringe on important liberty interests around marriage and intimate relations.

Here, in derogation of law, the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal.

As a threshold matter, it is absolutely clear that under Ohio law, from the founding of the state through at least 2004, the validity of a heterosexual marriage is to be determined by whether it complies with the law of the jurisdiction where it was celebrated. This legal approach is firmly rooted in the longstanding legal principle of *lex loci contractus* – *i.e.*, the law of the place of contracting controls. That is, a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. As the leading compendium of Ohio law states:

> Generally, a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. Thus, the validity of a common-law marriage is determined by the law of the state where it was consummated, and that of a solemnized marriage by the law of the state where it was contracted. Likewise, a marriage created in a foreign nation is valid according to that nation's laws. [. . .] The fact that the parties to a marriage left the state to marry in order to evade Ohio's marriage laws is immaterial to the marriage's validity in Ohio.

See 45 Ohio Jur. 3d Family Law § 11 (emphasis supplied).[11]

Thus, for example, as declared by the Supreme Court of Ohio in 1958, out-of-state marriages between first cousins are recognized by Ohio, even

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[11] Defendants did not argue that the Plaintiffs' marriages were obtained by fraud, nor that Plaintiffs were not genuinely migratory couples.

though Ohio law does not authorize marriages between first cousins. *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio Sup. Ct. 1958) (marriage of first cousins was legal in Massachusetts and therefore is legal in Ohio regardless of Ohio statute to the contrary); *Hardin v. Davis*, 16 Ohio Supp. 19, at *22 (Com. Pl. Hamilton Co. May 18, 1945) ("But, although first cousins cannot marry in Ohio, it has been held that if they go to another state where such marriages are allowed, marry, and return to Ohio, the marriage is legal in Ohio"); *Slovenian Mut. Ben. Ass'n v. Knafelj*, 173 N.E. 630, 631 (Ohio App. 1930) ("It is true that, under the laws of Ohio, if she were his first cousin he could not marry her; but they could go to the state of Michigan, or the state of Georgia, and perhaps many other states in the United States, and intermarry, and then come right back into Ohio and the marriage would be legal").

Likewise, under Ohio law, out-of-state marriages of minors are recognized by Ohio, even though Ohio law does not authorize marriages of minors. *See Peefer v. State*, 182 N.E. 117, 121 (Ohio App. 1931) (where underage couples leave the state to marry in a state in which their marriage is valid and return to Ohio, the marriage cannot be set aside based on Ohio's law against marriage of underage people); *see also Courtright v. Courtright*, 1891 Ohio Misc. LEXIS 161, at *7, *aff'd without opinion*, 53 Ohio 685 (Ohio 1895) (marriage between persons considered underage in Ohio married in a state where their marriage is legal "cannot be set aside, either because it was not contracted in accordance with the law of this state, or because the parties went out of the state for the purpose of evading the laws of this state").

Upon the record before this Court, Plaintiffs prevail on their claim that by treating lawful same-sex marriages differently than it treats lawful heterosexual marriages (*e.g.*, marriages of first cousins and marriages of minors), Ohio law, as applied here, violates the United States Constitution's guarantee that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."

1. Heightened Scrutiny

Since *Windsor*, the Sixth Circuit has not reviewed controlling law regarding the appropriate level of scrutiny for evaluating classifications based on sexual orientation, such as Ohio's marriage recognition bans. In the most recent Sixth Circuit case to consider the issue, *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012), the court rejected heightened scrutiny by relying on *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), for the proposition that sexual orientation has never been recognized as a suspect class in this circuit. *Scarbrough*, in turn, relied on *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997).

However, *Equality Foundation* no longer stands as sound precedential authority for the proposition that restrictions on gay and lesbian individuals are subject to rational basis analysis. As the Court for the Eastern District of Michigan recently pointed out, there are "ample reasons to revisit the question of whether sexual orientation is a suspect classification," including the fact that Sixth Circuit precedent on this issue – including *Equality*

Foundation – is based on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was overruled by *Lawrence* in 2003. *Bassett v. Snyder*, No. 12-10038, 2013 WL 3285111, at *1 (E.D. Mich. June 28, 2013) (same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employer benefits). The Supreme Court, in overruling *Bowers*, emphatically declared that it "was not correct when it was decided and is not correct today." *Lawrence*, 539 U.S. at 578. In repudiating the *Bowers* decision, the Supreme Court stated that "[i]ts continuance as precedent demeans the lives of homosexual persons" and represents "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.*

In overruling *Bowers*, the Supreme Court eliminated a major jurisprudential foundation of *Scarbrough*, *Equality Foundation*, and other decisions relied on to foreclose the possibility of heightened scrutiny for sexual orientation classifications.[12]

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[12] *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in Lawrence 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class'") (citations omitted); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*"). *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons

As a result, lower courts, without controlling post-*Lawrence* precedent on the issue, should now apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny.

In deciding whether a new classification qualifies as a suspect or quasi-suspect class, the Supreme Court considers:

> A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) and *City of Cleburne, Tex.*, 473 U.S. at 440-41 (citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class"); *accord Golinski*, 824 F. Supp. 2d at 987. As several federal and state

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seek to enter." 539 U.S. at 578. It does, however, erase the jurisprudential basis to conclude that sexual orientation is defined by constitutionally proscribable sexual acts and thus that classifications based on it are only appropriately evaluated under the rational basis test.

courts have recently recognized, a reasonable application of these factors leads to the conclusion that sexual orientation classifications should be subject to some form of heightened scrutiny.[13]

a. Historical Discrimination

The history of discrimination against gay and lesbian individuals has been both severe and pervasive. In 1952, Congress prohibited gay men and women from entering the country. (Doc. 42-1 at ¶ 48). In 1953, President Eisenhower issued an executive order requiring the discharge of gay people from all federal employment and mandating that all defense contractors and other private corporations with federal contracts ferret out and fire all homosexual employees, a policy which remained in place until 1975. (*Id.* at ¶¶ 46-47, 78). Even then, federal agencies were free to discriminate based on sexual orientation until President Clinton issued the first executive order forbidding such hiring discrimination in 1998. After World War II, known homosexual service members were denied GI Bill benefits, and later, when other people with undesirable discharges had their benefits restored, the Veterans Administration refused to restore them to gay people. (*Id.* at ¶ 42).

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[13] *See, e.g., Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) aff'd sub nom *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) vacated and remanded sub nom *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

Until the Supreme Court's *Lawrence* decision in 2003, consensual homosexual conduct was criminalized in many states. In the mid-twentieth century, bars in major American cities posted signs telling potential gay customers they were not welcome, and raids on gay bars in this period were "a fact of life, a danger every patron risked by walking through the door." (*Id.* at ¶ 56). Until 2011, homosexuals could not openly serve in the military, and the military still criminalizes sodomy today. (*Id.* at ¶ 40).

In 1993, Cincinnati voters passed Issue 3, which amended the city charter to prohibit the city from extending civil rights protections based on sexual orientation, which was not repealed until 2004. (*Id.* at ¶ 74).

The Republican Party in its 2012 Platform reaffirmed its support for a Constitutional amendment prohibiting same-sex marriage, and baselessly alleged that supporters of same-sex marriage rights were engaged in "hate campaigns, threats of violence, and vandalism . . . against advocates of traditional marriage." (Doc. 53-1 at 26).

The governor of Pennsylvania recently compared same-sex marriage to incest. (*Id.* at 25).

These are just some of the most egregious examples of discrimination against gays and lesbians at the hands of both federal and state governments, their officials, and one of the two primary political parties in our country, and based on these examples alone, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination." *Windsor*, 699 F.3d at 182; *see Pedersen*, 881 F. Supp. 2d at 318

("The long history of anti-gay discrimination which evolved from conduct-based proscriptions to status or identity-based proscriptions perpetrated by federal, state and local governments as well as private parties amply demonstrates that homosexuals have suffered a long history of invidious discrimination").

b. Ability to Contribute to Society

The other essential factor in the Supreme Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that "frequently bears [a] relation to ability to perform or contribute to society." *City of Cleburne, Tex.*, 473 U.S. at 440-41 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society").

"It is well-established that homosexuality is a normal expression of human sexuality. It is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society." (Doc. 46-1 at ¶ 11). As the *Windsor* appellate court provides: "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect.

But homosexuality is not one of them." *Windsor*, 699 F.3d at 682.[14] (emphasis supplied).

In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne, Tex.*, 473 U.S. at 440 (emphasis supplied).

c. Lack of Political Power

Lack of political power is not essential for recognition as a suspect or quasi-suspect class, *see Windsor*, 699 F.3d at 181, but the limited ability of gay people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation.

In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful

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[14] *See also Golinski*, 824 F. Supp. 2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society") (emphasis supplied); *Pedersen*, 881 F. Supp. 2d at 320 ("Sexual orientation is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"); *see also* Am. Psychiatric Ass'n, *Position Statement On Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 436, 497 (1974).

discrimination." *Id.* at 184. Due to the history of prejudice that gay men, lesbians, and bisexuals have faced, they are lacking in the political power to expand their civil rights. (Doc. 47-1 at ¶ 27) ("In light of the political disadvantages still faced by a small, targeted, and disliked group . . . gay men and lesbians are powerless to secure basic rights within the normal political processes").

One way gay men, lesbians, and bisexuals' lack of power is demonstrated is by the absence of statutory protections for them. For example, the gridlocked U.S. Congress has failed to pass any federal legislation prohibiting discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. (*Id.* at ¶ 30). Although a number of states have now extended basic anti-discrimination protections to gay men, lesbians, and bisexuals, the majority of states, including Ohio, have no statutory prohibition on firing, refusing to hire, or demoting a person in private sector employment solely on the basis of their sexual orientation. (Doc. 42-1 at ¶ 77). Similarly, the majority of states, including Ohio, do not provide statutory protections against discrimination in housing or public accommodations on the basis of sexual orientation. (*Id.*) In the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic anti-discrimination protections for gay, lesbian, and bisexual individuals have failed. (Doc. 47-1 at ¶ 40). Other measures of this group's lack of political power are the repeal or pre-emption of various legislative protections through ballot initiatives including anti-discrimination policies, anti-marriage initiatives, and adoption bans, and the underrepresentation of gays

and lesbians in political office. (*Id.* at 15-22). In Ohio, for instance, only two of 132 members – or 1.5% – of the state legislature identify as gay. (*Id.* at ¶ 51).

This lack of political power is caused by a number of factors, including small population size and dispersion, the effect of HIV/AIDS on the community, violence against gay and lesbian people, relative invisibility because many gay, lesbian, and bisexual people are not open about their sexual orientation, censorship, public hostility and prejudice, political and social hostility, unreliable allies in the political process, moral and political condemnation, and a powerful, numerous, and well-funded opposition. (*Id.* at 22-35). For example, violence against gay and lesbian people engenders intimidation, which can "undermine the mobilization of gays and lesbians and their allies to limit their free exercise of economic and social liberties." (*Id.* at ¶ 58). In Ohio, the number of hate crimes committed on the basis of sexual orientation increased from 15.8% of total hate crimes reported in 2009 to 25% in 2012. (*Id.* at ¶ 60). The total number of reported incidents decreased, but the number of incidents motivated by sexual orientation increased. (*Id.*)

The relative lack of political influence of gay people today stands in contrast to the political power of women in 1973, when a plurality of the Court concluded in *Frontiero*, 411 U.S. at 688, that sex-based classifications required heightened scrutiny. Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See id.* at 687-88. As stated, there are still no such bans on discrimination based on sexual

orientation in the federal government or the majority of states. *See Golinski*, 824 F. Supp. 2d at 988-989; *Pedersen*, 881 F. Supp. 2d at 326-27.

As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it.

d. Immutability

The heightened scrutiny inquiry sometimes also considers whether laws discriminate on the basis of "'immutable . . . or distinguishing characteristics that define [persons] as a discrete group.'" *Bowen*, 483 U.S. at 602 (citation omitted). This consideration derives from the "basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero*, 411 U.S. at 686; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that illegal alien children "have little control" over that status). There is no requirement, however, that a characteristic be immutable in order to trigger heightened scrutiny. For example, heightened scrutiny applies to classifications based on alienage and legitimacy, even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable).

To the extent that "immutability" is relevant to the inquiry of whether to apply heightened scrutiny, the question is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon. *See*

Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000) overruled on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) ("[S]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them"); *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. . . . the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity").

Under any definition of immutability, sexual orientation clearly qualifies. There is now broad medical and scientific consensus that sexual orientation is immutable. "Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective." (Doc. 46-1 at ¶ 10). Indeed, there is significant evidence to show that interventions to change sexual orientation can be harmful to patients, and no major mental health professional organization has approved their use. (*Id.* at ¶¶ 26-27). Further, when asked whether they have any choice in their sexual orientation, the vast majority of gay men and lesbians state that they have very

little or no choice in the matter. (*Id.* at ¶ 25).[15] Even more importantly, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual – even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom").[16]

Sexual orientation discrimination accordingly fulfills all the criteria the Supreme Court has identified, and thus Defendants must justify Ohio's failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis. Defendants have utterly failed to do so.

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[15] *See also Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation"); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24.

[16] *See also In re Marriage Cases*, 183 P.3d. at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment"); *Kerrigan*, 957 A.2d at 438 ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution"); *accord Golinski*, 824 F. Supp. 2d at 987; *Pedersen*, 881 F. Supp. 2d at 325.

2. Rational Basis

Moreover, even if no heightened level of scrutiny is applied to Ohio's marriage recognition bans, they still fail to pass constitutional muster.

"Even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "[S]ome objectives . . . are not legitimate state interests" and, even when a law is justified by an ostensibly legitimate purpose, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex.*, 473 U.S. at 446-47. "Rational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *City of Cleburne, Tex.*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of the federal DOMA violated equal protection guarantees because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and so a stigma

upon all who enter into same-sex marriages." *Windsor*, 133 S. Ct. at 2693.

The Supreme Court has described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Id.* at 2693; *Romer*, 517 U.S. at 633; *City of Cleburne, Tex.*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534.

However, an impermissible motive does not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," "fear," "irrational prejudice," "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *City of Cleburne, Tex.*, 473 U.S. at 448, 450; *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

The Sixth Circuit has held that "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Davis*, 679 F.3d at 438 (emphasis supplied) (quoting *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997) (inmate had viable equal protection claim where he alleged prison officials purposefully discriminated against him based on his sexual orientation when he was removed from prison job)).

In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *City of*

Cleburne, Tex., 473 U.S. at 446; *see, e.g.*, *Eisenstadt*, 405 U.S. at 448-49 (invalidating law on rational basis review because, even if deterring premarital sex is a legitimate governmental interest, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective"); *Moreno*, 413 U.S. at 535-36 (invalidating law on rational basis review because "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government's conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns").

This search for a meaningful connection between a classification and the asserted governmental interest also provides a safeguard against intentional discrimination. As the Supreme Court has explained, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.[17]

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[17] The Supreme Court has been particularly likely to find a classification too attenuated to serve an asserted government interest when the law imposes a sweeping disadvantage on a group that is grossly out of proportion to accomplishing that purpose. In *Romer*, the Court invalidated a Colorado constitutional amendment excluding gay people from eligibility for nondiscrimination protections because the law "identifie[d] persons by a single trait and then denie[d] them protection across the board." 517 U.S. at 633. Similarly, in *Windsor*, the Supreme Court invalidated the challenged section of DOMA as not sufficiently related to any legitimate governmental purpose

In *Bassett*, the court held that same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employee benefits where "[t]he historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians." 2013 WL 3285111 at *24-26. The Sixth Circuit has stated that where a provision has "no rational relationship to any of the articulated purposes of the state," a court is left with the necessary conclusion that the cited interests are pretextual. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002). In *Windsor*, the Supreme Court bolstered this truth, finding that:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.

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in part because it was "a system-wide enactment with no identified connection" to any particular government program. *Windsor*, 133 S. Ct. at 2694. In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them"). Ohio's sweeping marriage bans likewise exclude same-sex couples and their children system-wide from the protections and benefits afforded married couples and their families under the law.

Windsor, 133 S. Ct. at 2693. A review of the historical background and legislative history of the Ohio laws at issue leads to the same conclusion in the case at hand, that in refusing to recognize a particular type of legal out-of-state marriages for the first time in its history, Ohio is engaging in "discrimination[] of an unusual character" without a rational basis for doing so. *Id.* at 2692 (citing *Romer*, 517 U.S. at 633).

Consequently, the evidentiary record establishes that the requested relief is also to be granted to Plaintiffs on the basis of the Equal Protection Clause.

3. Potential State Interests

To survive rational basis scrutiny, the marriage recognition bans must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage.[18] "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be more skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its

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[18] As stated, at the time of the passage of Ohio's same-sex marriage bans, Governor Robert Taft stated that their purpose was "to reaffirm existing Ohio law with respect to our most basic, rooted, and time-honored institution: marriage between a man and a woman." (Doc. 41-1 at ¶ 72).

justification than is a newly created classification." *City of Cleburne, Tex.*, 473 U.S. at 454 n.6 (Stevens, J., concurring).[19] Indeed, just as the tradition of banning interracial marriage represented the embodiment of deeply-held prejudice and long-term racial discrimination in *Loving*, 388 U.S. at 1, the same is true here with regard to Ohio's marriage recognition bans and discrimination based on sexual orientation.

Supporters of Ohio's marriage recognition bans have also asserted that children are best off when raised by a mother and father. (Doc. 41-1 at ¶¶ 41, 88). Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, which it is not,[20] there is simply no

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[19] *See also Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (even longstanding practice should not be "taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society"); *In re Marriage Cases*, 183 P.3d at 853-54 ("[E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions").

[20] The overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples. (Doc. 43-1 at ¶¶ 18-19) ("[i]n . . . widely variable studies, the same findings continue to emerge: children reared by lesbian and gay parents are doing as well as children raised by heterosexual parents"). The American Psychological Association, the American Academy of Pediatrics, the American Medical Association, the American Academy of Child and Adolescent Psychiatry, and the American Academy of Family Physicians (among others) have all released statements in support of gay and lesbian parents and their ability and rights to rear children. (*Id.* at ¶ 16). This consensus has also

rational connection between the Ohio marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children.[21] The only effect the bans have

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been recognized by numerous courts. *See Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption"), aff'd sub nom. *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the wellbeing of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children"), aff'd sub nom. *Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Varnum*, 763 N.W.2d at 899, n.26 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is the optimal environment for children . . . is based more on stereotype than anything else"); *Golinski*, 824 F. Supp. 2d at 991 ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents").

[21] *See Golinski*, 824 F. Supp. 2d at 997 ("Even if the Court were to accept as true, which it does not, that opposite-sex parenting is somehow superior to same-sex parenting, DOMA is not rationally related to this alleged governmental interest"); *accord Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married. The Supreme Court aptly described how laws such as Ohio's marriage recognition bans affect families with same-sex parents:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . And it humiliates . . . children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Windsor, 133 S. Ct. at 2694 (internal citations omitted).

Because there is no rational connection between Ohio's marriage recognition bans and the asserted state interests, this Court can conclude that the ban violates equal protection even without considering whether it is motivated by an impermissible purpose. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"). In this case, however, the lack of any connection between Ohio's marriage recognition bans and any legitimate state interest also leads to the

conclusion that it was passed because of, not in spite of, its burden on same-sex couples.

Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest, no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans . . . to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community. When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality. *Windsor*, 133 S. Ct at 2696.

Consequently, no rational state basis to justify the marriage recognition bans has been advanced or evidenced in this case.[22]

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[22] As a final note, although the question of whether Ohio's refusal to grant same-sex marriages also violates Ohio same-sex couples' right to due process and equal protection is not before the Court in this case, the logical conclusion to be drawn from the evidence, arguments, and law presented here is that Ohio's violation of the constitutional rights of its gay citizens extends beyond the bounds of this lawsuit. *See also Kitchen v. Herbert*, 2:13-CV-00217 (D. Utah Dec. 20, 2013).

IV. A PERMANENT INJUNCTION BARRING ENFORCEMENT IN THIS CASE OF OHIO'S BANS ON RECOGNITION OF OTHER STATES' LAWFUL SAME-SEX MARRIAGES IS NECESSARY

As the United States Supreme Court found in *Windsor*, there is no legitimate state purpose served by Ohio's refusal to recognize same-sex marriages celebrated in states where they are legal. Instead, as in *Windsor*, the very purpose of the Ohio provisions, enacted in 2004, is to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S.Ct. at 2639. That is, the purpose served by treating same-sex married couples differently than heterosexual married couples is the same improper purpose that failed in *Windsor* and in *Romer*: "to impose inequality" and to make gay citizens unequal under the law. *See Windsor*, 133 S.Ct. at 2694; *Romer*, 517 U.S. at 635-36. It is beyond debate that it is constitutionally prohibited to single out and disadvantage an unpopular group.

Even if there were proffered some attendant governmental purpose to discriminate against gay couples other than to effect pure animus, it is difficult to imagine how it could outweigh the severe burden imposed by the bans on same-sex couples legally married in other states. Families deserve the highest level of protection under the First Amendment right of association:

> Marriage is a coming together for better or for worse, hopefully enduring, and

> intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Zablocki, 434 U.S. at 384 (citing *Griswold*, 381 U.S. at 486).

Even if the classification of same-sex couples legally married in other states is reviewed under the least demanding rational basis test, this Court on this record cannot find a rational basis for the Ohio provisions discriminating against lawful, out-of-state same-sex marriages that is not related to the impermissible expression of disapproval of same-sex married couples.

Moreover, denying Plaintiffs their associational rights under the circumstances presented here imposes irreparable harm. Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). In fact, "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Moore, 11A Federal Practice and Procedure at § 2948.1 (2d ed.).[23]

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[23] *See, e.g., Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (6th Cir. 2002) (a plaintiff can demonstrate that a denial of an injunction will cause

Without a permanent injunction, the official records of Plaintiffs' spouses' deaths, and the last official document recording their existence on earth, if amended to reflect Ohio law (and not this Court's Orders), would incorrectly classify them as unmarried, despite their legal marriages. The death certificates, if amended, would also incorrectly fail to record Plaintiffs as their surviving spouses, a status they lawfully enjoy. Furthermore, Mr. Arthur is now buried in his family plot at Spring Grove Cemetery. He also wanted Mr. Obergefell to be buried next to him someday, but the family plot directive limits those who may be interred in the plot to descendants and married spouses. Thus, without a permanent

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irreparable harm if the claim is based upon a violation of plaintiff's constitutional rights); *ACLU of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003) (if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm) (citations omitted); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3rd Cir. 1997) (denial of preliminary injunctive relief was irreparable harm to plaintiffs' voting and associational rights); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (holding that plaintiffs may establish irreparable harm based on an alleged violation of their Fourth Amendment rights); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (finding that a violation of privacy constitutes an irreparable harm); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (holding allegation of violation of Eighth Amendment rights sufficient showing of irreparable harm); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir 1975) (denial of constitutional privacy right was irreparable harm); *Beerheide v. Zavaras*, 997 F.Supp. 1405 (D.C. Colo. 1998) (irreparable harm satisfied by allegation of deprivation of free exercise of religion).

injunction, Mr. Arthur's burial could conceivably be upset and his remains might need to be exhumed. *See Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 209 F. Supp. 2d 1008, 1022 (D.S.D. 2002) (disruption of human remains can be irreparable harm). Dying with an incorrect death certificate that prohibits the deceased Plaintiffs from being buried with dignity constitutes irreparable harm.

Moreover, there is absolutely no evidence that the State of Ohio or its citizens will be harmed by the issuance of a permanent injunction restraining the enforcement of the marriage recognition ban provisions against the Plaintiffs in this case. Without an injunction, however, the harm to Plaintiffs is severe. Plaintiffs are not currently accorded the same dignity and recognition as similarly situated opposite-sex couples. Moreover, without a permanent injunction, Plaintiffs' legally valid marriages would be susceptible to amended incorrect recording in Ohio as not existing. Balanced against this severe and irreparable harm to Plaintiffs is the truth that there is no evidence in the record that the issuance of a permanent injunction will cause substantial harm to the public. And, as a final consideration, "the public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban 15 Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012).

Plaintiffs bear the burden of demonstrating their entitlement to an injunction, and an "injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet*, 305 F.3d at 573. Here, nevertheless,

weighing all factors applicable to analyzing whether injunctive relief should issue, the Court finds that each factor supports the granting of a permanent injunction.

V. CONCLUSION

Accordingly, Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 53) is hereby **GRANTED** as applied to these Plaintiffs. Specifically:

1. The Court finds and declares that Article 15, Section 11, of the Ohio Constitution, and Ohio Revised Code Section 3101.01(C), violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio, are denied their fundamental right to marriage recognition without due process of law; and are denied their fundamental right to equal protection of the laws when Ohio does recognize comparable heterosexual marriages from other jurisdictions, even if obtained to circumvent Ohio law.

2. Defendants and their officers are permanently enjoined from enforcing Ohio's marriage recognition bans on Plaintiffs. This includes such officials completing death certificates as the need arises for Plaintiffs in a manner consistent with this Order.

3. The Court finds and declares that Plaintiff Robert Grunn may, consistent with and in

reliance upon the United States Constitution and this Court's Final Order, report on Ohio death certificates he completes as an Ohio funeral director that a decedent married in a state authorizing same-sex marriage is "married" or "widowed" and report the name of the decedent's surviving same-sex spouse as the "surviving spouse".

4. Defendant Dr. Theodore E. Wymyslo shall make a best faith effort to communicate Notice of this Final Order to all persons within Ohio who assist with completing Ohio death certificates, and Dr. Wymyslo shall evidence such compliance by filing with this Court an Affidavit by 3/31/14.

5. The Court will separately issue an Order of Permanent Injunction to these effects, whereupon the Clerk shall enter judgment accordingly and **TERMINATE this case** (in this Court).

IT IS SO ORDERED.

Date: December 23, 2013

s/ Timothy S. Black
Timothy S. Black
United States District Judge

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[i] Susan J. Becker has been a professor at Cleveland State University's Cleveland-Marshall School of Law since 1990, before which she was a litigator for the law firm then known as Jones, Day, Reavis and Pogue. She teaches a course entitled "Sexual Orientation and the Law" and the majority of her scholarship addresses the animus historically directed at the LGBT population as well as the historic and continuing rationales for that discrimination. She also maintains a pro bono practice, the majority of which involves providing legal advice to same-sex couples about their rights under Ohio law. (*See* Doc. 41).

George Chauncy is the Samuel Knight Professor of History and American Studies and past Chair of the Department of History at Yale University, where he has taught since 2006. From 1991 to 2006, he was a Professor of History at the University of Chicago. He teaches, researches, and writes extensively on gay rights generally and same-sex marriage in particular, and has provided testimony for numerous cases involving similar issues. (*See* Doc. 42).

Megan Fulcher, Ph.D., is an Associate Professor in the Department of Psychology at Washington and Lee University. She received her Ph.D. in psychology from the University of Virginia in 2004, where she was mentored by Dr. Charlotte J. Patterson, a preeminent scholar in research on lesbian and gay parents. Dr. Fulcher teaches, researches, and writes extensively on the topics of child development,

sexuality, gender-role development and parent-child relationships. (*See* Doc. 43).

Joanna L. Grossman is the Sidney and Walter Siben Distinguished Professor of Family Law at the Maurice A. Deane School of Law at Hofstra University, teaching family law with special emphasis on the history of marriage regulation and the legal responses to modern family forms. She has also taught at American University School of Law, Cardozo Law School, Tulane Law School, University of North Carolina School of Law, and Vanderbilt Law School. She teaches, researches, and writes extensively on the sociolegal history of marriage, divorce and the family, state regulation of marriage, the law and controversy regarding same-sex marriage, and the rules of interstate marriage recognition. (*See* Doc. 44).

Bernard L. McKay is a licensed and practicing attorney with Frost Brown Todd LLC in Cincinnati who practices mainly in the areas of estate planning, probate, and trust administration and is certified by the Ohio State Bar Association as a specialist in estate planning, trust, and probate law. Mr. McKay is a Fellow in the American College of Trust and Estate Counsel and a member of the Cincinnati Estate Planning Council and the Cincinnati Bar Association, where he has served as Chair of the Estate Planning and Probate and Advanced Estate Planning and Probate Institute Committees. (*See* Doc. 45).

Letitia Anne Peplau, Ph.D., is a Distinguished Research Professor and the Psychology Department Vice Chair for Graduate Studies at the University of

California, Los Angeles. She was a Professor of Psychology at UCLA from 1973 until 2010. From 2005-2011, she served as Director of the UCLA Interdisciplinary Relationship Science Program, which trains doctoral students in the study of families and other personal relationships. She teaches, researches, and writes extensively on personal relationships, gender, and sexual orientation, and has provided testimony for numerous cases involving similar issues. In the 1970s, she was one of the first researchers to conduct empirical investigations of the intimate relationships of lesbians and gay men, and has continued this program of research for the past 35 years. (*See* Doc. 46).

Gary M. Segura, Ph.D., is a Professor of American Politics in the Department of Political Science at Stanford University. He is the founding Director of the Institute on the Politics of Inequality, Race and Ethnicity at Stanford, and the founding co-Director of the Stanford Center for American Democracy. He is one of the Principal Investigators of the American National Election Studies for 2009-2013, the premier data-gathering project for scholars of American elections. He teaches, researches, and writes extensively on public attitudes, opinion, and behavior with respect to politics and minority group politics in particular. He is a member of the Sexuality and Politics organized section of the American Political Science Association, has served on the Southern Political Science Association's Committee on the Status of Gays and Lesbians, and was part of the Executive Committee of the Sexuality Studies Program at the University of Iowa. (*See* Doc. 47).